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No. 426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

BOWMAN STIRLING TIGHE — Petitioner

vs.

MRS. LOU FRISSELL MOORE — Respondent

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Decision to be Reviewed	1
Jurisdiction	1
Questions Presented	2
Constitutional Provison Involved	3
Statement of the Case	
Background of Case and Prior Proceedings	3
Pleadings in the Trial Court	5
The Hearing in the Trial Court	8
Proceedings in the Supreme Court of Mississippi	12
The Constitutional Question as Raised in the State Court	12
Reasons for Granting the Writ	17
The Decision of the Supreme Court of Mississippi is in Conflict with the Decisions of the Supreme Court of the United States	18
The Constitutional Questions Involved are of Great Public Interest and Importance and the Decision of the Supreme Court of Mississippi in Regard Thereto Calls for an Exercise of the Supervisory Powers of this Court	25
Conclusion	28
Appendix	31
Exhibit 1.—Final Decree, August 7, 1959—Chancery Court of the First Judicial District of Hinds County, Mississippi	31

Page

Exhibit 2.—Agreed Decree, December 28, 1960—Chancery Court of the First Judicial District of Hinds County, Mississippi 35

Exhibit 3—Petition to Modify Agreed Decree 41

Exhibit 3a.—Order Granting Permission to Take Children out of Jurisdiction of Court, April 28, 1960—Chancery Court of the First Judicial District of Hinds County, Mississippi 50

Exhibit 3b.—Performance Bond 53

Exhibit 4.—Answer of Respondent to Petition to Modify Agreed Decree 57

Exhibit 5.—Excerpt from Record of Chancellor's Opening Statement 72

Exhibit 6.—Excerpt from Record of Colloquy between Court and Counsel for Petitioner. (Respondent in trial court) 74

Exhibit 7.—Excerpt from Record of Colloquy between Court and Counsel for Petitioner (Respondent in trial court) Concerning Performance Bond 78

Exhibit 8.—Bench Opinion of Chancellor—Chancery Court of the First Judicial District of Hinds County, Mississippi 82

Exhibit 9.—Excerpt from Record of Special Findings of Fact of Chancellor—Chancery Court of the First Judicial District of Hinds County, Mississippi 90

Page

Exhibit 10.—Excerpt from Record of Colloquy between Court and Counsel for Respondent (Petitioner in trial court) 93

Exhibit 11.—Decree Modifying Former Decrees, August 7, 1962—Chancery Court of the First Judicial District of Hinds County, Mississippi 94

Exhibit 12.—Assignment of Errors—Supreme Court of Mississippi 101

Exhibit 13.—Opinion and Order of Affirmance of Supreme Court of Mississippi—April 22, 1963 106

Exhibit 14.—Order of Supreme Court of Mississippi Overruling Suggestion of Error—June 3, 1963 121

CITATIONS

Cases:

Blount v. Blount, 231 Miss. 368, 95 So. 2d 545 (1957) 25

Berger v. United States, 225 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921) 22-24

C.I.O. v. McAdory, 325 U.S. 472, 477, 65 S. Ct. 1395, 89 L. Ed. 1741 16

Caritativo v. People of the State of California, 357 U.S. 549, 78 S. Ct. 1263, 2 L. Ed. 2d 1531 (1958) Dissenting Opinion of Mr. Justice Frankfurter joined in by Mr. Justice Douglas and Mr. Justice Brennan 24

Page

Cashin v. Murphy, 138 Miss. 853, 103 So. 787 (1925) 8, 15, 16

Central Union Telegraph Co. v. Edwardsville, 269 U.S. 190, 194-5, 46 S. Ct. 90, 70 L. Ed. 229 16

Charleston Federal Savings & Loan Assn' v. Alderson, 324 U.S. 182, 185-6, 65 S. Ct. 624, 89 L. Ed. 857 17

Chesapeake & Ohio R. Co. v. McDonald, 214 U.S. 191, 29 S. Ct. 546, 53 L. Ed. 936 16

Cohen v. Hurley, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) 24

Harding v. Illinois, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394 16

Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 84, 42 L. Ed. 215 (1897) 19, 21, 24, 26

John v. Paullin, 231 U.S. 583, 585, 34 S. Ct. 178, 58 L. Ed. 381 16

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951) Concurring opinion of Mr. Justice Frankfurter 24

Louisville & Nashville R. Co. v. Higdon, 234 U.S. 592, 597-8, 34 S. Ct. 948, 58 L. Ed. 1484 17

Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 124, 34 S. Ct. 874, 58 L. Ed. 1245 17

Offutt v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954) 24

Page

Parker v. Illinois, 333 U.S. 571, 574-5, 68 S. Ct. 708, 92 L. Ed. 886 16

Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796 16

Radio Station WOW v. Johnson, 326 U.S. 120, 128, 65 S. Ct. 1475, 89 L. Ed. 2092 17

Tighe v. Tighe, 239 Miss. 666, 123 So. 2d 623, (1960); Suggestion of Error Overruled, 239 Miss. 666, 124 So. 2d 843 4

Whitney v. California, 274 U.S. 357, 360-1, 47 S. Ct. 641, 71 L. Ed. 1095 17

Statutes:

Mississippi Code of 1942, Sec. 2743 6, 18

United States Code, Title 28, Sec. 1257(3) 1

United States Code, Title 28, Sec. 2101(c) 1

Miscellaneous:

Constitution of the State of Mississippi, Sec. 165 14-15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. .....

BOWMAN STIRLING TIGHE ..... Petitioner

vs.

MRS. LOU FRISSELL MOORE ..... Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bowman Stirling Tighe, Pro Se, makes this his Petition for Writ of Certiorari; and prays the grant and issuance of such Writ, showing as follows:

DECISION TO BE REVIEWED

The decision and decree concerning which certiorari is sought is of the Supreme Court of Mississippi in cause styled "Bowman Stirling Tighe, Appellant v. Mrs. Lou Frissell Moore, Appellee," No. 42,559 on the docket of said Court not yet officially reported, but unofficially reported at 151 So. 2d 910.

The decree sought to be reviewed was entered on April 22, 1963, in the Supreme Court of Mississippi; Suggestion of Error filed in said Court by Petitioner was overruled on June 3, 1963, on which date said decree became final.

JURISDICTION

Jurisdiction to review said decree by Writ of Certiorari is conferred on this Court by Title 28, U.S.C., Sections 1257(3) and 2101(e).

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether or not Petitioner was denied his constitutional right to a fair and impartial hearing by the trial court chancellor of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and consequently denied his constitutional right to "due process of law" upon a hearing in said lower court involving the rights of Petitioner, as father, and Respondent, as mother, of two minor children in the matter of custody and visitation of said children between the parties. Said hearing was in a proceeding commenced in said lower court by Respondent in which she sought and obtained the relief of modification and change in the child-custody provisions of a previous decree of said lower court styled "Agreed Decree" which had theretofore provided for the custody and visitation of said minor children as between Petitioner and Respondent.

2. Whether or not Petitioner was denied his constitutional right to a fair and impartial hearing or to any hearing at all by said Chancellor, and consequently denied his constitutional right to "due process of law" upon an issue in said proceeding as to whether or not a performance bond theretofore required of Respondent should have been cancelled and the sureties thereon discharged, such bond having been previously ordered by said lower court to insure the continuing jurisdiction of said lower court and to insure the performance by Respondent of all orders of said Court, and to insure to Petitioner his rights to custody and visitation of the minor children of the parties.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this cause is the "due process clause" of Section 1 of the Fourteenth Amendment to the *Constitution of the United States* cited at United States Code, 1958 Edition, Volume 1-9, p. XLVII, as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts material to the consideration of the case are as follows:

BACKGROUND OF CASE AND PRIOR PROCEEDINGS

Petitioner and Respondent, formerly husband and wife, were divorced in the Chancery Court of the First Judicial District of Hinds County, Mississippi by final decree of that court dated August 7, 1959. (R 4-7) A copy of said Final Decree is appended hereto as Exhibit 1. In that proceeding there was no issue as to the custody of the two minor children of the parties, although the matter was contested as to the amount of alimony and support money granted to Respondent. Under said decree custody of the children, Lynn Adelaide Tighe, a girl now nearing ten years of age, and Bowman Stirling Tighe, Jr., a boy, now eight years of age, was granted to Respondent "with

reasonable rights of visitation" awarded to Petitioner. (R. 5) The lower court granted to Respondent alimony and child support money and also made other provisions for the support and care of the children. In a further provision of said decree the lower court directed Respondent to keep the minor children of the parties within the jurisdiction of the court and prohibited her from removing the children beyond the jurisdiction of the court unless prior application be made to the court and permission granted. (R. 6) Appeal was taken to the Supreme Court of Mississippi by this Petitioner from said decree as to the amount of alimony and support money, and cross-appeal was taken by Respondent herein as to the aforesaid requirement placed upon her as to prohibition of removal of the children outside the State of Mississippi. The case was affirmed on both direct and cross-appeals in the Supreme Court of Mississippi. *Tighe v. Tighe*, 239 Miss. 666, 123 So. 2d 623 (1960); Saggestion of Error Overruled, *Tighe v. Tighe*, 239 Miss. 666, 124 So. 2d 843 (1960).

Subsequent to the aforesaid decision of said Court, Respondent remarried to one W. S. Moore, a practicing attorney of the City of Jackson, and a member of the Bar of the State of Mississippi, on December 22, 1960. (R. 32, 34) Petitioner is also a practicing attorney of the City of Jackson and a member of the Bar of the State of Mississippi and a member of the Bar of the Supreme Court of the United States, and for some while prior to the aforesaid marriage of Respondent and W. S. Moore, Petitioner and said W. S. Moore met in conference and negotiated and drew an "Agreed Decree" which in the main provided for the custody and visitation of the children, Lynn and Bo, as between Petitioner and Respondent. (R. 29-34, 84-85, 170-173). A copy of said Agreed

Decree is appended hereto as Exhibit 2. This Agreed Decree was agreed to and approved by Respondent and by the said W. S. Moore, who was at such time acting as one of her counsel, and by Petitioner, and was entered by the lower court, Honorable S. V. Robertson, Jr., presiding Chancellor. (R. 34)

In said Agreed Decree the lower court found that such provisions for custody and visitation therein were in the best interest and welfare of the children. (R.29) In brief resume, the custody and visitation provided in the Agreed Decree granted to Petitioner weekend custody between stated hours on Friday through Saturday night and on Sunday afternoon (R. 30) and also provided as between the parties that custody and visitation would be with Petitioner on certain holidays and vacation time from school with Petitioner and certain thereof would be with Respondent according to the schedule set forth. (R. 30-31) Also Petitioner was granted the right of custody and visitation on what was called in said Agreed Decree "'special days,'' the same being other holidays and family birthdays and the like. (R. 32)

Subsequent to December 28, 1960, when said Agreed Decree was entered, no further proceedings were had in the cause until some eighteen months later, when, on July 2, 1962, Respondent filed her Petition to Modify Agreed Decree. (R. 35-44) A copy of said Petition is appended hereto as Exhibit 3.

PLEADINGS IN THE TRIAL COURT

In her Petition to Modify Agreed Decree (R. 35-44) Respondent alleged that since the rendition of the Agreed Decree of December 28, 1960, there had been a material change in circumstances of the parties and of the case. Said Petition was brought under authority of the *Mis-*

sissippi Code of 1942, as amended, Section 2743, reading in part as follows:

> "Section 2743. Custody of Children and Alimony. When a divorce shall be decreed from the bonds of matrimony the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage. * * * and the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. * * * "

The facts alleged in support of said petition were that the children were 18 months older, that Respondent had been married less than a week, with her husband acting as her attorney in the matter, and that he did not advise her properly as to her rights. (R. 36-37) She alleged that the best interests and welfare of the children demanded a modification in said Agreed Decree.

In her petition Respondent also alleged that there had been a material change in circumstances since April 28, 1960, when the lower court had entered an order styled "Order Granting Permission to Take Children out of Jurisdiction of Court" such as to warrant action by the court in terminating a $1,000 performance bond required of her under the provisions of such order with reference to removal of the children beyond the jurisdiction of the court and with reference to custody and visitation to Petitioner. (R. 40-42, 11-13, 14-16). Copies of said Order and said Performance Bond are appended hereto respectively as Exhibits 3a and 3b. This relief was sought despite the fact that subsequent to the negotiations between counsel leading to the approval by the parties of

the Agreed Decree, such bond had remained in full force and effect up to, and from and after, the entering of the Agreed Decree on December 28, 1960. No facts were alleged as occurring subsequent to December 28, 1969 which would warrant termination and cancellation of such bond.

The answer of Petitioner to this petition was styled "Answer of Respondent to Petition to Modify Agreed Decree." (R. 45-59) A copy of said answer is appended hereto as Exhibit 4. It denied substantially all of the allegations of the petition, more specifically denying that there had been any material change in circumstances which would warrant a modification of the Agreed Decree as to custody and visitation of the children and that there were not any conditions present whatever which required a modification or change for the best interests and welfare of the children. To the contrary said answer averred that the exchange of love and affection between the children and Petitioner, as their father, was to their definite best interests and welfare. The answer also denied that the performance bond should be cancelled, averring the reason therefor as being the necessity for such requirement in order to insure to Petitioner his rights of custody and visitation. Therefore, an issue was made up between the parties as to whether or not under the conditions existing at the time of the hearing based on facts since the Order requiring it on April 28, 1960 had been entered. Additionally, as part of such answer Petitioner included a "Special Plea of Res Judicata," (R. 55) directed both to the efforts of Respondent to obtain a modification in the custody of the children and at her attempt to cancel the bond. As to the bond, Petitioner specifically averred that it was subject to that aspect of the doctrine of res judicata; that the doctrine applies to all matters which

could have been raised in prior proceedings as well as to those matters which were raised, referring there to the Agreed Decree.

THE HEARING IN THE TRIAL COURT

The case was called for hearing on July 27, 1962. The lower court chancellor, Honorable S. V. Robertson, Jr., senior chancellor of the court, made a voluntary opening statement at the hearing in which he stated *that the court took judicial notice that the Agreed Decree was not for the best interests of the children*, further stating that "it is not going to take a lot of testimony * * * to convince this court that *we should start all over again* and *knock out this schedule of visitation that is set up*," and indicating that *he did not desire to hear testimony "in defense" of such Decree*. (R. 64-65) At that time counsel for Petitioner announced his desire to offer the evidence which had been prepared for Petitioner for the purpose of making a record in the case. (R. 66) As will be set forth hereinafter as to the matter of raising the constitutional question in this case of denial to Petitioner of a fair and impartial hearing and consequently a denial of "due process," it is important to note that under the procedure at trial in the State of Mississippi, and more particularly under the chancery practice and procedure of Mississippi, where the court always sits without a jury, it is seen that the trial judge does not himself pass upon the question of his fairness or impartiality; those matters are for determination of the appellate court upon review of such actions of the trial judge. Consequently, the request by counsel for Petitioner for permission of the court to make the record showing the colloquy between the court and counsel was the manner in which the constitutional question was raised. See *Cashin v. Murphy*, infra. At this point the Court stated that it would permit

the record of such to be made. An excerpt of such statement and colloquy with counsel is appended hereto as Exhibit 5.

After the exchange between court and counsel had been duly noted, the aforesaid W. S. Moore, who was acting again as counsel for his wife, the Respondent, called Respondent, Mrs. Lou Frissell Moore, as a witness in her own behalf.

Again during the course of Respondent's testimony and cross-examination the trial judge made some further remarks in line with his opening statement announcing the decision of the court in which he stated unequivocally that "*the court intends to modify the Decree*" and that *in saying as much constituted prejudging the case* "*then I prejudge it.*" (R. 116) At this point in the proceedings counsel for Petitioner again showed his objection to the court's action in pronouncing the court's decision prior to the hearing of any testimony in behalf of Petitioner by again calling on the court for permission to make the record of such remarks for subsequent review by the appellate court. An excerpt of such statement and colloquy with counsel is appeaded hereto as Exhibit 6.

At a further and subsequent point in the hearing and during the cross-examination of Respondent counsel for Petitioner attempted to go into the question of whether or not the performance bond of Respondent should be cancelled in accordance with the prayer of her petition, and under the issue as raised by the pleadings Petitioner had denied that this relief should be granted. However, *the court refused to hear any testimony concerning this, either by way of cross-examination or by way of direct testimony.* An excerpt of such colloquy between the court and counsel is appended hereto as Exhibit 7. (R. 130-

134) Counsel for Petitioner then noted his objection to this action by the court by stating into the record what was proposed to be shown in connection with the performance bond and why according to the position of Petitioner in the case that performance bond should remain in full force and effect.

At the close of the testimony the chancellor announced in a bench opinion (R. 289-297) the full text of his decision, which had in effect been rendered in the opening statement of the court and its striking similarity to some of the language contained in the opening statement is apparent. A copy of such bench opinion is appended hereto as Exhibit 8. After the Court had announced its holding that the Agreed Decree would be modified and the court's own schedule of visitation substituted therefor, counsel for Petitioner moved for special findings of fact. (R. 298) Neither in response to this motion for special findings of fact nor in its bench opinion did the court give any facts whatever which show a material change of circumstances of the case or which show that any element was present which had been to the detriment of the best interests and welfare of the children. It is significant as to the "fair trial" feature of the case, that at this point the court made this statement: "It is absolutely clear that the court considered that very Decree *from the beginning* as not for the welfare and the best interests of these little children. * * *." An excerpt of such special findings of fact and colloquy with counsel is appended hereto as Exhibit 9.

Subsequent to these further announcements by the Court, counsel for Petitioner moved for appeal with supersedeas, which was denied, and moved for allowance to prepare certain parts of the record for purposes of use in further efforts in obtaining an appeal with super-

sedeas. This was also denied. (R. 301-304) Also at this point the court engaged in an exchange with counsel for Respondent concerning the actions and previous remarks of the chancellor and the consequent possible influence of bias and prejudice during the course of the hearing against Petitioner. This extraordinary display showing unfairness by the chancellor was apparently recognized as such by counsel for Respondent. An excerpt of such exchange between the court and counsel is appended hereto as Exhibit 10. (R. 303-304) In the Court's Final Decree, which was styled "Decree Modifying Former Decrees" (R. 309-315), the Court in attempting to completely modify the Agreed Decree of December 28, 1960 also went behind said Decree and modified the lower court's order of April 28, 1960 which had required of Respondent a performance bond in the amount of $1,000 and overruled Petitioner's "Special Plea of Res Judicata:" this despite the absence of any testimony on the issue. A copy of said "Decree Modifying Former Decrees" is appended hereto as Exhibit 11.

The Court also removed any limitation on removal of the children beyond the jurisdiction of the court although no relief in that respect was sought by Respondent and no issue was raised during the proceedings concerning this matter. The net substance of the change in custody and visitation was to completely eliminate any regular association by Petitioner with his children on a regular basis, reducing his weekend visitation and holidays which had theretofore been agreed upon, to only four days per month, with a six weeks period provided for in the summer, impractical for a practicing attorney such as Petitioner. This visitation actually only provides for ten weekends per year, ten other afternoons, plus five days at Christmas and the summer period. The lower court

in its decree was most specific in its limitation of Petitioner's rights in regard to the substituted schedule provided by the Court in the decree, its language stating: "The same is all the custody and visitation rights awarded to the defendant and respondent, Bowman Stirling Tighe." (R. 313) That decree also included language calculated to deter Petitioner in any manner that it could in obtaining supersedeas on appeal. (R. 314)

PROCEEDINGS IN THE SUPREME COURT OF MISSISSIPPI

After appeal with supersedeas was denied by the lower court, Petitioner applied to and obtained from Associate Justice Percy M. Lee of the Supreme Court of Mississippi an appeal with supersedeas. (R. 316-338)

THE CONSTITUTIONAL QUESTION AS RAISED IN THE STATE COURT

Upon the call of the appeal in the Supreme Court of Mississippi, Petitioner duly filed his Assignment of Errors in that Court specifically setting forth the constitutional questions which are again raised here, namely, that Petitioner was denied fair and impartial hearing by the lower court chancellor in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and thus was denied due process of law under the due process clause of Section 1 of the Fourteenth Amendment to the *Constitution of the United States*.

The paragraphs of such Assignment of Errors which are pertinent to the raising of such constitutional questions are paragraphs 1 and 9. (R. 355-359) A copy of said Assignment of Errors is appended hereto as Exhibit 12. Thereafter written briefs were submitted by both Petitioner and Respondent and oral argument was made to the Supreme Court of Mississippi, and on April 22,

1963, that Court rendered its decision and decree affirming the decree of the lower court. (R. 360-375) A copy of the opinion of the Supreme Court of Mississippi and its order affirming the decree of the lower court is appended hereto as Exhibit 13.

In its opinion the Supreme Court of Mississippi recognized that one of the issues squarely presented to it was the constitutional question as to whether Petitioner had received a fair and impartial trial. (R. 366) The issue before it as framed by that Court was stated as follows in the opinion:

> "The appellant has assigned and argued four main points as grounds for reversal of the decree, viz: (1) that the lower court erred in prejudging the case against the appellant by announcing at the beginning of the hearing of the petition for modification of decree dated December 28, 1960, and again during the course of the hearing, that it had prejudged the case, and in denying the appellant a fair and impartial trial; * * *." (R. 366)

The Court then devoted the most part of the next two pages of its opinion considering and passing on that constitutional issue. Its language at that point seems to base the reasoning for its decision on the view that since Petitioner had been allowed to make his record and to put on evidence in support of his case that he had thus been accorded due process of law, notwithstanding "the remarks made by the Court." (R. 367)

The Court's opinion as so stated is significant in so far as the proceedings for Writ of Certiorari are concerned. It is seen that such Court has now placed itself on record as announcing a rule in the matter of procedure in hearings in the chancery courts of Mississippi, that

court sitting by a judge without a jury, to the effect that once a litigant has been accorded the right to present evidence and testimony in a hearing he has been accorded all rights to due process of law, notwithstanding the fact that the trial judge has openly pronounced decision and judgment against him prior to hearing and trial.

In regard to Petitioner's contention that he has also been denied due process of law by the refusal of the trial court to allow any testimony on the issue of the cancellation of the performance bond, the Court opined that the ruling of the trial judge did not prejudice such right of Petitioner, thus passing upon that issue. It is, therefore, apparent that such constitutional issue as to both questions herein asserted was squarely met and passed on by the Supreme Court of Mississippi and in fact the last statement in its opinion concerning the same was a final rejection of that constitutional issue against Petitioner when it said: "There was no denial of the appellant's constitutional right to a fair and impartial hearing."

The Court also observed that the lower court chancellor "was not disqualified" from hearing the case and that no request was made to recuse him for such disqualification. However, that observation was actually immaterial to the consideration of the case or the decision, in view of the fact that the legal term "disqualification" is defined in Mississippi as applying to a trial judge who is connected with one of the parties to the litigation by affinity, consanguinity, or has a pecuniary interest in the case. These are specifically the only grounds for disqualification of a trial judge in Mississippi.

That applicable state constitutional provision is cited as the *Constitution of the State of Mississippi*, Section 165, which is quoted as follows:

"Section 165. No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity, consanguinity, or where he may be interested in the same, except by the consent of the judge and the parties. Whenever any judge of the Supreme Court or the Judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of the court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified."

The term "interest" as used in the constitutional provision has been undisputedly construed as meaning "pecuniary interest." See *Cashin v. Murphy*, infra.

The means by which such constitutional questions were raised in the trial court were by request in open court of counsel for Petitioner during the proceedings in the lower court to make the record of such remarks indicating the prejudgment of the court for the purposes of appeal to the Supreme Court of Mississippi at the stage of the proceedings (R. 64-65, R. 115-119, R. 130-134) (Appendix-Exhibits 5, 6 and 7) where the lower court chancellor indicated that he had prejudged the case.

In Mississippi there is no statutory or constitutional provision for disqualification of a trial judge in a situation where he exhibits lack of fairness and impartiality. The Supreme Court of Mississippi has held under such circumstances that the trial judge is not the one which should pass upon such question but that the appellate

court is the proper tribunal for consideration of the matter upon review. That Court in the case of *Cashin v. Murphy*, 138 Miss. 853, 103 So. 787 (1925) in so holding said that "no judge is left to try himself for unbecoming conduct in Mississippi."

Viewing this Mississippi rule, it is apparent that Petitioner took all steps necessary at the trial court level to preserve the point of denial to him of a fair and impartial trial, and it is well settled under the decisions of the Supreme Court of the United States that such methods and procedures as are recognized by the State itself will also be recognized by the Supreme Court of the United States. See *Central Union Telegh. Co. v. Edwardsville*, 269 U.S. 190, 194-5, 46 S. Ct. 90, 70 L. Ed. 229; *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796; *Parker v. Illinois*, 333 U.S. 571, 574-5, 68 S. Ct. 708, 92 L. Ed. 886; *John v. Paullin*, 231 U.S. 583, 585, 34 S. Ct. 178, 58 L. Ed. 381; *C.I.O. v. McAdory*, 325 U.S. 472, 477, 65 S. Ct. 1395, 89 L. Ed. 1741; *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191, 29 S. Ct. 546, 53 L. Ed. 936; *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394.

In any event, however, the matter of whether or not these constitutional questions were timely and properly raised in the trial court is of no consequence, in view of the manifest fact that such constitutional questions were presented to the Supreme Court of Mississippi in a most specific manner in the Assignment of Errors of Petitioner, and subsequently that appellate court recognized such issues in its opinion and passed upon them, devoting a substantial portion of its opinion to so doing.

Therefore, there now exists the irrebutable presumption that such constitutional questions were timely and

properly raised in the state courts, and this Court will not go behind the decision of the Supreme Court of Mississippi which so passed on those constitutional questions. See: *Louisville & Nashville R. Co. v. Higdon*, 234 U.S. 592, 597-8, 34 S. Ct. 948, 58 L. Ed. 1484; *Radio Station WOW v. Johnson*, 326 U.S. 120, 128, 65 S. Ct. 1475, 89 L. Ed. 2092; *Whitney v. California*, 274 U.S. 357, 360-1, 47 S. Ct. 641, 71 L. Ed. 1095; *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 124, 34 S. Ct. 874, 58 L. Ed. 1245; *Charleston Federal Savings & Loan Assn' v. Alderson*, 324 U.S. 182, 185-6, 65 S. Ct. 624, 89 L. Ed. 857.

Subsequent to the rendition of decision and decree by the Supreme Court of Mississippi, Petitioner filed his Suggestion of Error to that Court, which was overruled on June 3, 1963, without further opinion by the Court. (R. 375) A copy of the Court's order overruling said Suggestion of Error is appended hereto as Exhibit 14.

REASONS FOR GRANTING THE WRIT

The argument amplifying the reasons relied on for the allowance of the Writ, with authorities in support thereof, is as follows:

1. That the decision and decree of the Supreme Court of Mississippi in this case is in conflict with and repugnant to the holdings and decisions of prior cases in this Court applicable to the constitutional questions involved.

2. That the decision and decree of the Supreme Court of Mississippi raises the important question of what is now and subsequently to be the right of all private citizens in the State of Mississippi to a fair and impartial hearing or trial in the trial courts of that State under the Due Process Clause of Section 1 of the Fourteenth Amendment to the *Constitution of the United States*, and

in consequence thereof is a matter of public interest and great importance to all private citizens of the State of Mississippi; further that the decision and decree of the Supreme Court of Mississippi has so far sanctioned a departure by the chancery court of the First Judicial District of Hinds County, Mississippi from the accepted and usual course of judicial proceedings as to call for an exercise of the powers of supervision of the Supreme Court of the United States.

THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

The case at bar was a "modification proceeding" brought under authority of Section 2743 of the *Mississippi Code of* 1942, as amended, cited supra.

As to such modification proceeding, this statute has been construed to require the original petitioner in such proceeding to show by competent evidence (1) that a material change of circumstances has occurred warranting a modification of the former decree of the court, and (2) that the best interests and welfare of the minor children require such modification. Clearly these things are matters which are required to be shown conclusively, and this is a concept which has evolved over a good many years and through a good many decisions of the Supreme Court of Mississippi. In the case at bar, the trial judge announced in his opening statement after taking the bench, again at a point in the course of Respondent's testimony, she being the petitioner and the first witness in the lower court proceedings that he had decided the case prior to the hearing of any evidence or testimony. (R. 64-65, 116-119, 289, 300, 303-304)

These remarks are shown in the excerpts from the record appended hereto as Exhibits 5, 6, and 10. Initially Petitioner would invite the Court's attention to the age-old precept of our jurisprudence to the effect that a hearing which is not a fair and impartial hearing and a hearing in which the issue has been prejudged by the court amounts to no hearing at all to the aggrieved litigant, or at least one in which he has been denied every vestige of due process of law and right and justice administered according to law and equity.

The Supreme Court of Mississippi has, in effect, ruled in this case that once a party has been accorded a hearing and the opportunity to present evidence therein he has thereby been accorded his constitutional right to due process of law, notwithstanding the fact that the trial judge may have spoken from the bench to the parties appearing before the court and advised them of his attitude and disposition of mind as to final decision of the court even to the extent of so advising them that he had prejudged the case before him for hearing.

That decision thus became in conflict with the principles announced by this Court in *Harvey v. Elliott*, 167 U.S. 409, 17 S. Ct. 84, 42 L. Ed. 215 (1897). Although it cannot be contended that the decision of the state court is in direct conflict with the decision in *Harvey v. Elliott*, as applied to the facts of the case at bar, for the reason that in the cited case the aggrieved party there was denied any hearing at all after being summoned with due service of process, the reasoning and principle in the cited case is none-the-less applicable to the case at bar, and the conflict between the decision in the case at bar and the cited case as to the constitutional principle announced is abundantly clear. Precisely, those principles

announced in *Hovey v. Elliott* stand for the proposition of "condemnation *only after hearing.*" (Emphasis added)

An applicable quote from that case to this effect was "a sentence of a court *pronounced against a party without hearing him* or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal." (Emphasis added)

In harmony with the above quote, the Court further observed in its opinion Mr. Webster's argument in the *Dartmouth College* case, where that learned and respected advocate said that our law was a law which "*hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,*" and that judicial proceedings which do not conform to such principle "cannot be valid." (Emphasis added)

The rationale of the decision of the Supreme Court of Mississippi was that Petitioner had a hearing and thus had due process. It summarily distinguished the cases and authorities cited by Petitioner by its observation that cases cited in behalf of Petitioner's position involved situations where the litigants had been denied hearing and the right to present evidence. The net effect of this reasoning by that court is that a litigant may be condemned prior to hearing with decision and judgment pronounced against him in open court, prior to the receiving of any evidence or testimony, if subsequently the court allows a hearing to proceed. It is manifest from a reading of the court's opinion that the Supreme Court of Mississippi took full cognizance of the remarks and pronouncement of the lower court chancellor in reaching this result, which result cannot be reconciled with the principles of *Hovey v. Elliott.*

Petitioner recognizes that domestic relations and child-custody matters are preeminently for determination by the States. In such matters it is undisputed that the lower court chancellors sitting as a court to hear both law and facts have a wide latitude of discretion. However, when such discretion becomes so unbridled as to depart from procedures governing individual rights in the conduct of the business of the courts, it becomes not a state matter but a matter to be considered as coming within the constitutional principles announced in *Hovey v. Elliott*. The consideration of any issue as to whether the decision of that lower court or the decision of the Supreme Court of Mississippi in affirmance thereof is right or wrong is far overshadowed, and that feature of the case must give way to a consideration of procedural rights and constitutional principle.

Hovey v. Elliott also tells us that there is no distinction in principle between the determining of a cause upon issues not raised by the pleadings in the actual absence of the party on the one hand, and in determining a cause by refusal on the other hand of hearing to the party. By the same token, Petitioner would show that there is no distinction in principle from the foregoing where the party has judgment pronounced against him in open court and then is accorded a formal hearing thereafter, which in actuality is only a semblance of a hearing.

Neither Respondent in any of her argument nor the Supreme Court of Mississippi in any of its observations of the conduct of the hearing in the lower court has ever questioned that the pronouncements of the lower court chancellor, at the commencement of the hearing, at a point during the hearing prior to the offering of any evidence or testimony in behalf of Petitioner and at several other points during the hearing, did in fact show conclusively

at the times that such pronouncements were made that such chancellor had an attitude of prejudgment against the case of Petitioner. That court simply reasoned that "even so, you were heard."

The only logical reason which can be advanced to support the reasoning of the Supreme Court of Mississippi in this is to say that the Court presumed that the lower court chancellor, even after making such remarks, subsequently put those remarks wholly out of his mind, and then accorded to Petitioner a full and fair hearing and based his ultimate decision on the evidence presented. As to this, Petitioner submits (1) that the chancellor's language was so opinionated to begin with and so firmly stated as to remove any reasonable probability that he did in fact put this attitude on his part out of his mind and (2) the fact that it was repeated throughout the hearing showed that such attitude remained unchanged and continued and had not been put from his mind throughout the hearing.

In consideration of this aspect on proceedings for certiorari, it is quite apparent that the view of the Supreme Court of Mississippi in regarding the attitude of the lower court chancellor, as indicated by his repeated remarks, is in direct conflict with the holding and decision of this Court and the principles announced, in *Berger v. United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921). In the cited case there was involved a consideration of the attitude of Judge Kenesaw Mountain Landis toward certain defendants charged with violations of the Espionage Act. The attitude of Judge Landis, as indicated by remarks made by him, was the determining factor of an issue in the case as to the sufficiency of an affidavit which had been filed in an attempt to disqualify Judge Landis from the hearing of the case. The Government's

position was that no "facts" as such were shown by the remarks of Judge Landis. However, this contention was rejected in the decision, which held that such remarks had so indicated Judge Landis' attitude toward the defendants that his disqualification was warranted. This Court said the facts showing such remarks were not "frivolous and fanciful," but "substantial and formidable, and they have relation to the attitude of Judge Landis' mind toward defendants."

It is, therefore, practically beyond dispute that that holding by this Court and the significance to which it attaches to the attitude of a trial judge's mind, as indicated by remarks made by him, is in direct conflict with the view of the Mississippi Supreme Court in this case where its opinion indicates that such remarks as made by the lower court chancellor were not determinative of any feature of the case where a hearing subsequently followed.

Moreover, it is noted that in the *Berger v. United States* case this Court observed that the remedy of appeal is inadequate in a situation where the evil such as may be shown in the attitude of a judge has played a part in the decision in the trial court. This Court said that after such evil had been worked the decision then went to the reviewing tribunal fortified by presumption, even though it was a disposition of a mind in which there was a personal ingredient. Such reasoning is apparently a direct rebuff to and, therefore, in conflict with any reasoning by the Supreme Court of Mississippi that the lower court chancellor in the exercise of a judicial responsibility was able to and did put from his mind the attitude which was indicated by him throughout the lower court proceedings.

If such remedy by appeal is inadequate, then the only remedy available to a party so aggrieved is through

attempt to gain review of violation of his individual rights guaranteed under the Constitution and Due Process Clause thereof.

The decision of the Supreme Court of Mississippi is also in conflict with the principles announced in the following cases which display the same reasoning as is contained in *Hovey v. Elliott*, supra: *Offutt v. United States*, 348 U.S. 11; 75 S. Ct. 11, 99 L. Ed. 11 (1954); *Cohen v. Hurley*, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951); Concurring Opinion of Mr. Justice Frankfurter; *Carita-tivo v. People of California*, 357 U.S. 549, 78 S. Ct. 1263, 2 L. Ed. 2d 1531 (1958), Dissenting Opinion of Mr. Justice Frankfurter joined in by Mr. Justice Douglas and Mr. Justice Brennan.

Upon the issue of the cancellation of the performance bond of Respondent as considered in the proceedings for certiorari, it is sufficient to say that upon this well defined issue in the lower court no hearing at all was accorded Petitioner. The chancellor refused either testimony by Petitioner in opposition to the cancellation of such bond or by Respondent in requiring her to show by competent evidence that she was entitled to such cancellation. Therefore, the same reasoning as to conflict with applicable decisions of this Court, as argued hereinbefore, applies, the only distinction being that upon this issue actually no hearing was had, and the law of the forum required evidence to sustain Respondent's position for cancellation of the bond before that action could be taken by the lower court without a total denial to Petitioner of procedural rights in this regard. That was not a matter within the discretion of the Chancery Court unless based

on evidence. See *Blount v. Blount*, 231 Miss. 398, 95 So. 2d 545 (1957).

THE CONSTITUTIONAL QUESTIONS INVOLVED ARE OF GREAT PUBLIC INTEREST AND IMPORTANCE AND THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IN REGARD THERETO CALLS FOR AN EXERCISE OF THE SUPERVISORY POWERS OF THIS COURT.

The issue on the merits of this case is whether Petitioner received fair and impartial hearing, viewing the fact of statements by the lower court chancellor indicating his prejudgment of the case. The Supreme Court of Mississippi with full recognition of the statements by the lower court chancellor held that due process of law had not been violated in that said lower court chancellor, after making such remarks, permitted to Petitioner a hearing. As has been argued hereinbefore, this ignores the attitude of the chancellor's mind, and, therefore, the further consideration herein should be and is whether such circumstances as have now resulted from the decision of the Supreme Court of Mississippi warrant consideration by this Court of the case urged by Petitioner as it affects or probably will effect other litigants who are now to be governed by the decision of the Supreme Court of Mississippi in the case at bar. In other words, we glean from the opinion of the Supreme Court of Mississippi that such obvious attitude as was displayed by the lower court chancellor is not determinative of the issue of whether or not a litigant has received a fair and impartial hearing and trial and consequently due process of law. The Supreme Court of Mississippi, in effect, has said that a trial judge may tell those who are before him in a litigable controversy how he will decide the case before him; but then if he follows such attitude, and remarks indicating such attitude, with allowance to such litigants of a hearing

and the opportunity to present evidence, he has afforded them due process of law.

Petitioner contends that this situation as has resulted from the decision in the state court upon this important individual procedural right in the conduct of judicial proceedings at the trial court level demands the consideration of the Supreme Court of the United States. If such a rule as has been approved by the Supreme Court of Mississippi is now to exist, all private citizens seeking relief through such state courts must be and will be affected thereby. Otherwise stated, such rule will affect the right of all private citizens in the State of Mississippi to a fair and impartial hearing or trial in the trial courts of that State under the Due Process Clause, Section 1 of the Fourteenth Amendment to the *Constitution of the United States*, and in consequence thereof is a matter of public interest and great importance to all private citizens of the State of Mississippi.

Petitioner's rights, as asserted herein, to a fair and impartial hearing under such constitutional provision, have evolved over several centuries to English-speaking people, and the importance thereof is emphasized thereby. This is best exemplified under the discussion contained in *Hovey v. Elliott*, supra, which traces those rights as stemming from the Magna Charta. The concept of the right to all parties to a fair and impartial hearing has not simply evolved under a construction and interpretation of the Due Process Clause since the writing of our Constitution, but was one of the basic concepts concerned under Due Process as first laid by the Magna Charta and later adopted in the Fourteenth Amendment; and Petitioner submits that if other private citizens of the State of Mississippi are to have their rights in this regard affected by a decision of the Supreme Court of Missis-

sippi which even slightly suggests that litigants can obtain a fair trial after the trial judge has stated that he has prejudged the case, then such decision should unquestionably be reviewed by this Court in order to prevent the operation of such decision in a manner which will work harm to those rights of private citizens.

Further, if such state court decision even suggests that it will approve a decision of a trial judge which is made prior to hearing and without the benefit of evidence presented, it has taken an offical position as regards the possible approval of a lower court decision made solely by the judge, not judicially after the hearing of evidence and based on the law of the forum, but by him in his effort and desire to do what he thinks personally is best for the litigants as the correct decision of the Court.

Under such circumstances, the oft quoted phrase "Ours is a Government of laws and not of men" would be meaningless for, when judges turn their backs upon the sometimes considered hard strictures of the law and set about to do "the right thing," then we are truly departing from the fundamentals and are well upon the road to the loss of our basic rights and freedom, that have been wrought from a thousand years of travail by our Anglo-Saxon ancestors. Paradoxically enough, the judge who deserts the fundamentals of the law and seeks to do "the right thing" is a close forerunner of the tyrant.

Can it be said that the Supreme Court of Mississippi has not sanctioned a departure by the lower court chancellor in this case from the accepted and usual court of judicial procedure as not to call for an exercise of this Court's power of supervision? On the other hand, can it be said that a trial judge's pronouncement of a case against a litigant is the accepted and usual course of

judicial proceedings, even if such pronouncement is followed by a hearing and opportunity to present evidence? Only a casual reading of the record in this cause, with the cold print that is contained therein, abundantly shows the astoundment of counsel for both Petitioner and Respondent in the lower court on the several occasions of these pronouncements by the lower court chancellor. If such procedure in the trial courts of Mississippi is suggested as being sanctioned or permitted by the opinion and decision of the Supreme Court of Mississippi in this case, then certainly such proposition is proper for consideration of this Court on certiorari.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BOWMAN STIRLING TIGHE
Petitioner Pro Se

BOWMAN STIRLING TIGHE
B. L. TIGHE, JR.
Counsel for Petitioner

APPENDIX

EXHIBIT 1

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

LOU FRISSELL TIGHE — Complainant

vs.

BOWMAN STIRLING TIGHE — Defendant

FINAL DECREE

This day this cause came on to be heard upon the Original Bill for Divorce filed by the Complainant, and upon personal service of process had on the Defendant in the time and manner required by law; and upon answer filed by the Defendant; both parties being represented by their respective counsel; and the Defendant, having offered no evidence upon the allegations of the answer with respect to the grounds for divorce and the cause having proceeded to trial upon the ground for divorce and upon the other issues raised in the Bill of Complaint; and

The Court having heard all the evidence adduced in open Court, finds that it has complete jurisdiction of the parties and the subject matter; and that the Complainant is entitled to the relief prayed for in the Bill of Complaint.

It Is, Therefore, Ordered, Adjudged and Decreed that the bonds of matrimony heretofore existing between the Complainant, Lou Frissell Tighe, and the Defendant, Bowman Stirling Tighe, be, and the same are hereby forever dissolved and held for naught, and the Complain-

ant, Lou Frissell Tighe, is hereby granted a full, complete and absolute divorce from the Defendant.

It Is Further Ordered, Adjudged and Decreed that the permanent care, custody and tuition of the two minor children, namely: Bowman Stirling Tighe, Jr. and Lynn Adelaide Tighe, be, and the same is hereby awarded unto the Complainant, Lou Frissell Tighe, with reasonable rights of visitation awarded unto the Defendant, Bowman Stirling Tighe.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe, pay unto the Complainant, Lou Frissell Tighe, the sum of One Hundred Twenty Five Dollars ($125.00) per month as alimony, commencing on the 7th day of August, 1959, and a like sum on the 7th day of each month thereafter, payable in advance, pending further orders of this Court.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe, pay unto the Complainant, Lou Frissell Tighe, the sum of One Hundred Twenty-Five Dollars ($125.00) per month as support and maintenance for the two minor children, Bowman Stirling Tighe, Jr. and Lynn Adelaide Tighe, commencing on the 7th day of August, 1959 and a like sum on the 7th day of each month thereafter, payable in advance, pending further orders of this Court.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe, pay unto the Complainant, Lou Frissell Tighe, the sum of Two Hundred Dollars ($200.00) to apply on her attorneys' fees.

It Is Further Ordered, Adjudged and Decreed that out of the total sum of Two Hundred Fifty Dollars ($250.00) paid by the Defendant, Bowman Stirling Tighe, unto the

Complainant, Lou Frissell Tighe, that the Complainant shall pay the monthly installments on the notes on the house and in case of default of 15 days or more by the Complainant, the Defendant shall have the right to pay the same and deduct said amount from the payment of alimony, unless the Defendant be in default on his payment of alimony and child support to the Complainant.

It Is Further Ordered, Adjudged and Decreed that the Complainant is hereby granted the use and possession of the home heretofore jointly occupied by the parties hereto, and the use of all furniture now in the home located at 114 Pasa Robles Avenue, Jackson, Hinds County, Mississippi, and is further granted the use of one 1951 model Plymouth automobile, pending further orders of this Court.

It Is Further Ordered, Adjudged and Decreed that the Complainant is hereby directed to keep the two minor children within the jurisdiction of this Court and is hereby prohibited from removing said children beyond the jurisdiction of this Court unless prior application is made to this Court and permission granted.

It Is Further Ordered, Adjudged and Decreed that all costs of Court are hereby taxed against the Defendant.

So Ordered, Adjudged and Decreed this the 7th day of August, 1959.

s S. V. ROBERTSON, JR.
Chancellor

APPROVED AS TO FORM:

s CLARENCE R. SCALES
Attorney for Complainant

s W. F. GOODMAN, JR.
Attorney for Defendant

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Final Decree is a true and correct copy as appears on record in my office in Min. Book 185, Page 173.

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: s/ Judith Thompson, D. C.

EXHIBIT 2

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

LOU FRISSELL TIGHE ..... Complainant

vs.

BOWAN STIRLING TIGHE ..... Defendant

AGREED DECREE

Came on this day this cause to be heard upon the entry of appearance and oral motion of the parties hereto and of counsel for Complainant, Lou Frissell Tighe, whereby they submitted to the Court the following provisions as a modification of that certain Final Decree heretofore entered in this cause on August 7, 1959, and of record in Book 185 at Page 173 on the minutes of this Court; and it appearing to the Court that such provisions should be adopted and that said Final Decree should be modified in accordance therewith, and finding that the Court has full and complete jurisdiction of the parties and of the subject matter, including jurisdiction of the two minor children of the parties; namely, Lynn Adelaide Tighe, a girl, born December 31, 1953, and Bowman Stirling Tighe, Jr., a boy born September 2, 1955, in whose best interest and welfare such provisions are, the Court is of the opinion and finds that the following relief should be granted:

Therefore, be it and it is Hereby Ordered, Adjudged and Decreed that the provisions of the aforesaid Final Decree with reference to the custody and visitation of said minor children, contained in the fourth paragraph

thereof, are modified and changed to grant additionally unto Defendant, Bowman Stirling Tighe, as the father of said minor children, custody and visitation with said minor children, as follows:

1. *On Regular Weekends*, to include every weekend in calendar year except as hereinafter set forth and except where inconsistent with the same:

   a. From 4:00 p.m. on Friday until 7:30 p.m. on Saturday, and

   b. From 2:00 p.m. on Sunday until 7:30 p.m. on Sunday,

   c. Provided, however, that Complainant may by 10 days notice in writing to the Defendant elect to retain custody and visitation of said minor children for an entire weekend for any two regular weekends during the year not adjacent to a holiday or special day, and not on consecutive weekends, from 4:00 p.m. on Friday until 7:30 p.m. on Sunday and Defendant, on the other hand, may elect to do the same by giving such notice to Complainant.

2. *On Special Weekends and Holidays*, to include those weekends and holidays as hereinafter set forth:

   a. From 4:00 p.m. on last day of school for children preceding holiday until 7:30 p.m. on day preceding first day of school for children after holiday; provided, however, that when such weekend or holiday does not occur during regular school term it shall commence at 4:00 p.m. two days prior to holiday day and end at 7:30 p.m. two days subsequent to such holiday day. Said special weekends and holidays are enumerated as follows:

(1) Holidays from school adjacent to or connected with a regular weekend.

(2) Spring Holidays or Easter (with the exception that the provisions of 1. b. supra shall apply as to the custody and visitation on Easter Sunday.)

(3) Fourth of July holidays.

(4) Labor Day holidays.

(5) Thanksgiving holidays.

Provided, however, that the same shall apply only in even numbered years as to (3) and (5) and in odd numbered years as to (4); provided further, however, that Defendant shall have custody and visitation of said children on two additional weekends similar in length to (3) and (5) in odd numbered years and one additional weekend similar in length to (4) in even numbered years, by election to do so in the manner as provided by 1. c. supra.

3. *During Christmas Vacation and Holidays* to include the following:

a. From 2:00 p.m. to 7:30 p.m. on December 25.

b. From 9:00 a.m. on December 26 to 2:00 p.m. on December 31.

4. *On Additional Special Days* in addition to the above:

a. January 5—4:00 p.m. to 7:30 p.m.

b. April 24—4:00 p.m. to 7:30 p.m.

c. Father's Day—7:30 p.m. on Saturday preceding to 7:30 p.m. on Sunday.

d. Mother's Day—No custody and visitation to Defendant on Sunday.

e. September 2—2:00 p.m. to 7:30 p.m. (when such date is on a weekend, Complainant shall have custody and visitation of said children from 2:00 p.m. to 5:00 p.m.)

f. October 31—6:00 p.m. to 6:30 p.m.

g. November 19—4:00 p.m. to 7:30 p.m.

5. Said custody and visitation of said minor children as set forth herein shall be available by each party to the other in Jackson, Mississippi, and shall be effective from and after January 3, 1961.

It Is Further Ordered, Adjudged and Decreed that the provisions of the aforesaid Final Decree with reference to the payment by Defendant to Complainant of the sum of $125 per month as alimony, contained in the fifth paragraph thereof, are modified and changed so as to hereafter relieve Defendant of the requirement of such payment, the Court being advised of the remarriage of Complainant on December 22, 1960.

It Is Further Ordered, Adjudged, and Decreed that the provisions of said Final Decree with reference to the granting to Complainant of the use and possession of the former home of the parties aforesaid and the use of all furniture there located and the use of one 1951 model Plymouth automobile, contained in the ninth paragraph thereof, are modified and changed by striking and deleting the same as a provision of said Final Decree, the Court being advised that the parties hereto have made disposition and settlement of the same as between them and being advised that a final settlement of the same has been effected by instruments of conveyance and release as between said parties.

It Is Further Ordered, Adjudged and Decreed that the provisions of said Final Decree with reference to the

requirement on the part of Complainant that she obtain permission of this Court prior to any removal of said minor children beyond the jurisdiction of the Court, contained in the tenth paragraph thereof, is modified only to the extent that she is not so required for out of state visits not exceeding fourteen days; provided, however, that in no event shall such out of state visits conflict with the custody and visitation of Defendant as set forth herein.

It Is Further Ordered, Adjudged and Decreed that the provisions of said Final Decree with reference to the payment by Complainant of the monthly installment notes on the former home of the parties located at 114 Pasa Robles Avenue in the City of Jackson, contained in the seventh paragraph thereof, are modified and changed so as to hereafter relieve Complainant of the requirement of such payment.

It Is Further Ordered, Adjudged and Decreed that all petitions and motions now pending before this Court in this cause be and they are hereby dismissed.

Ordered, Adjudged and Decreed this the 28th day of December, 1960.

s S. V. ROBERTSON, JR.
Chancellor

Agreed to and approved this 21st day of December, 1960.

s LOU FRISSELL TIGHE
Complainant

s W. S. MOORE
One of her counsel

s BOWMAN STIRLING TIGHE
Defendant

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Agreed Decree is a true and correct copy as appears on record in my office in Min. Book 200, Page 561.

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: /s/ Judith Thompson, D. C.

EXHIBIT 3

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

MRS. LOU FRISSELL MOORE — Petitioner

vs.

BOWMAN STIRLING TIGHE — Defendant

PETITION TO MODIFY AGREED DECREE

Comes now your petitioner, Mrs. Lou Frissell Moore, and files this her petition to modify an agreed decree heretofore entered by this Court, and in support of her petition would show unto the Court the following facts, to-wit:

1.

That the defendant, Bowman Stirling Tighe, is an adult resident citizen of the First Judicial District of Hinds County, Mississippi, resides at 1541 Winchester Street, Jackson, Mississippi, and has offices at the Plaza Building, Jackson, Mississippi.

2.

That your petitioner, Mrs. Lou Frissell Moore, is one and the same person as the Lou Frissell Tighe who was the Complainant in this Cause.

3.

Petitioner would show that on the 7th day of August, 1959, a certain Final Decree was entered in this Cause which is of record in Minute Book 185 at Page 173 of the

Minutes of this Court; Petitioner would show that on the 28th day of April, 1960, a certain Order Granting Permission to Take Children Out of Jurisdiction of Court was entered in this Cause which is of Record in Minute Book 193 at Page 107 of the Minutes of this Court; and Petitioner would show that on the 28th day of December, 1960, an Agreed Decree was entered in this Cause which is of record in Minute Book 200 at Page 561 of the Minutes of this Court.

4.

Petitioner would show that since the rendition of the Agreed Decree of December 28, 1960, there has been a material change in circumstances of the parties, and the circumstances of the case have changed. Petitioner would show that both of the children have become eighteen months older and both are now better able to express their own personal desires in this matter, even though they are both still to young to testify in any lawsuit of this nature. Petitioner would show that at the time she entered into the Agreed Decree of December 28, 1960, she had been married less than a week and her husband acted as her attorney in that matter. Petitioner would show that her husband was entirely too close to the situation to advise her properly as to her rights and as to the best interest of her children, and after a period of ninety days, or less, after the rendition of said Agreed Decree of December 28, 1960, she has sought other counsel who was and is not as close to the situation as her husband. That at the time she entered into the Agreed Decree of December 28, 1960, she was advised and did believe that it was immaterial what visitation was established in said Agreed Decree, because the defendant would soon tire of such visitation and would see the children less and less. Petitioner would show that, to the contrary, defendant has taken

every advantage of every provision of the Agreed Decree, and has also contended that the visitation set out in the Agreed Decree was only additional visitation, and that in addition to the specified visitation, he has the right of reasonable visitation. Petitioner would show that soon after the decree of December 28, 1960, was entered, she realized that the visitation established in the Agreed Decree was harmful and injurious to the children, but was prevailed upon to give the vistation established in the decree every chance to work. Petitioner would show that she has now waited eighteen months to file this petition, and can no longer stand by and let such unreasonable visitation affect the welfare of her children.

5.

Petitioner would show that even though she agreed and approved the Agreed Decree of December 28, 1960, she now realizes, through the experience of eighteen months' time, that the visitation arrangement of the Agreed Decree is one which is impracticable and unworkable if either the children or their mother are to obtain any benefit or pleasure with each other. Petitioner would further show that as a result of the impracticable and unworkable visitation solution proposed by the parties in the decree of December 28, 1960, the children do not have a sense of permanency in their home because they leave their home fifty of the fifty-two weekends of the year, and in addition leave for other visitation with the defendant as set out in the Agreed Decree. Petitioner would show that she is not attempting to take away from the defendant the right of reasonable visitation of the children, but is only requesting that this Court change and modify the decree so as to establish a schedule of reasonable visitation of the children, and to abolish the present unreasonable, imprac-

ticable and unworkable visitation schedule submitted to this Court and entered on the 28th day of December, 1960.

6.

Petitioner would show that at the time of the rendition of the decree of December 28, 1960, the children had been living in Little Rock, Arkansas, for ten months, and did not know any of the children in their neighborhood at 1733 Willhurst Street, Jackson, Mississippi; for the past eighteen months, the children have made many good and lasting friends in their neighborhood and it is not to the best interest of the children and they do not desire to leave their home and friends.

7.

Petitioner would show that for as long as the children can remember, they have not had a permanent place to stay and call their home, and remain at their home for any length of time without any interference or visitation by anyone other than the persons residing at their home, and such is not to the best interest of these children or any children. Petitioner would show that although both of these children are very bright, they have never been able to realize their full potential in their school work, despite nightly homework sessions at the home of the Petitioner. Petitioner would show that despite a heavy homework load imposed by the Petitioner, during the previous school year, Lynn did sub-standard work in [redacted] is having trouble with arithmetic and Ba[redacted] is having trouble with did sub-standard work in reading. Petitioner would show that she has been working with the children on the sub-standard subjects during the summer months. Petitioner would further show that, because of the unreasonable, impracticable and unworkable visitation schedule set out in the decree of December 28, 1960,

the children have not been able to enjoy their association with their mother during the week and have been with the defendant during the weekends, thus depriving them of the pleasure and enjoyment of having a mother to do the little things with them and for them that they would treasure for the rest of their lives.

8.

Petitioner would show that since the rendition of the Agreed Decree of December 28, 1960, the children have arrived at an age when they can now have their little friends to spend the night with them, and they can now spend the night with their little friends, but the visitation schedule as established in the decree of December 28, 1960, is such that the children are away from their home all of almost every Friday night, and are away from their home until 7:30 at night on almost every Saturday and Sunday, and the parents of their little friends will not allow their children to spend the night out on school nights; therefore, during the nine months of the school year, it is almost impossible for the children to have friends over to spend the night with them or for them to spend the night with friends. Petitioner would show that during the three summer months, the children are at home so seldom because of the visitation schedule established in the decree of December 28, 1960, that there are very few occasions when they can have friends over to spend the night or can spend the night at the home of their friends. Petitioner would show that such visitation by and between children is beneficial to them, and is to their best interest, so long as the same is not abused, and that at the time the decree was entered on December 28, 1960, the children had no friends in their neighborhood with whom to exchange visits.

9.

That because of the confusion created by the visitation of the defendant as described herein, the said children have become uncertain and emotionally unstable because of the lack of security in their own home and with their mother and that it is to the best interest of said minor children because they are eighteen months older than the date the previous visitation decree was entered; that a material change has occurred because they are older and that it is to the best interest of said children that the former decree be modified at the discretion of this Court.

10.

Petitioner would show that on the 13th day of April, 1960, she filed a petition for permission to leave jurisdiction and the Order of April 28, 1960, was entered by this Court which provides in part, "Since Petitioner's change of address would remove said minor children beyond the jurisdiction of the Court, Petitioner should be required to post a reasonable bond to assure her faithful performance of this and further orders of this Court." Petitioner would show that a bond in the penal sum of $1,000 dated May 5, 1960, approved May 23, 1960, was made and entered into by Mrs. Lou Frissell Tighe, as Principal, and H. N. Frissell, Mrs. Irene S. Frissell, Mrs. Harriett C. Fincher and A. A. Fincher, as Sureties, such bond being of record in Miscellaneous Bond Book 2 at Page 406. Petitioner would show that on December 22, 1960, and since the rendition of the Order of April 28, 1960, Petitioner remarried and has been living with her husband in Jackson, Mississippi, at 1733 Williurst Street, within the jurisdiction of this Court, continuously since December 26, 1960, and there is no longer any necessity for such bond. Petitioner would further show that there

has been a material change of circumstances since the rendition of the Order of April 28, 1960, relative to the bond, and that such Order should be modified to the extent that no bond is hereafter required. Petitioner would further show that she was under the impression that the bond was of no further force or effect, and is still of that opinion, and has been advised and believes and charges that the bond has no further legal significance, but because of certain threats made by the defendant that he would sue the Sureties, Mrs. Harriett C. Fincher and A. A. Fincher, for the slightest infraction in the Agreed Decree of December 28, 1960, Petitioner charges that it is necessary that said Order of April 28, 1960, relative to the bond, be modified to the extent that the bond be no longer required and the sureties thereon be discharged. Petitioner would show that the Sureties, H. N. Frissell, Mrs. Irene S. Frissell, Mrs. Harriett C. Fincher and A. A. Fincher have joined in this petition, by Bob Ray, their Solicitor, to evidence their objection to the continuing effect of the bond, and respectfully request that the Court discharge them as Sureties on said bond, and relieve them of any further liability thereon.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that process issue from this Court, returnable at such time and place established by Your Honor, commanding the defendant to show cause, if any he can, the following: Why the Decree of December 28, 1960, should not be modified only so far as visitation is concerned; why the Order of April 28, 1960, should not be changed and modified so as to eliminate the necessity of

a bond and why the bondsmen under the bond not be discharged, and Petitioner prays for general relief.

Respectfully submitted,

s/ BOB RAY

BOB RAY, Solicitor for Petitioner, Mrs. Lou Frissell Moore, and Solicitor for Sureties, H. N. Frissell, Mrs. Irene S. Frissell, Mrs. Harriett C. Fincher and A. A. Fincher.

BOB RAY
ATTORNEY AT LAW
200 PETROLEUM BUILDING
JACKSON, MISSISSIPPI

STATE OF MISSISSIPPI
COUNTY OF HINDS

This day personally appeared before me, the undersigned authority in and for said County and State, the within named Mrs. Lou Frissell Moore, who, after having been by me first duly sworn, states on oath that the matters and facts as set forth in the foregoing petition are true and correct as therein stated, and the matters alleged on information and belief, she verily believes to be true and correct.

s MRS. LOU FRISSELL MOORE

Sworn to and subscribed before me this, the 29th day of June, 1962.

s Mrs. SYLVIA KETCHAM
Notary Public

My Commission Expires:

STATE OF MISSISSIPPI
COUNTY OF HINDS

This day personally appeared before me, the undersigned authority in and for said County and State, the within named Bob Ray, Solicitor for Sureties H. N. Frissell, Mrs. Irene S. Frissell, Mrs. Harriett C. Fincher and A. A. Fincher, who, after having been by me first duly sworns, states on oath that he believes that the matters and facts as set forth in the foregoing petition are true and correct as therein stated, and the matters alleged on information and belief, he verily believes to be true and correct.

s BOB RAY

Sworn to and subscribed before me, this, the 29th day of June, 1962.

s Mrs. SYLVIA KETCHAM
Notary Public

My Commission Expires:

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Petition to Modify Decree is a true and correct copy as appears on record in my office in Jackson, Miss., Book , Page .

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: s Judith Thompson, D. C.

EXHIBIT 3a

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

IN THE MATTER OF
MRS. LOU FRISSELL TIGHE — Complainant

vs.

BOWMAN STIRLING TIGHE — Defendant
EX PARTE
MRS. LOU FRISSELL TIGHE

ORDER GRANTING PERMISSION TO TAKE CHILDREN OUT OF JURISDICTION OF COURT

This day this cause came on to be heard upon the written application of Mrs. Lou Frissell Tighe for permission from this Court to remove her residence and the residence of Lynn Adelaide Tighe and Bowman Stirling Tighe, Jr., to Little Rock, Arkansas, and

The Court having heard and considered the same and it appearing unto the Court that the best interest of said minor children would be best served by allowing the Petitioner to remove her residence together with said minor children to Little Rock, Arkansas, where Petitioner's parents will be able to aid the said Petitioner in caring for said children. And it further appearing unto the Court that since Petitioner's change of residence would remove said minor children beyond the jurisdiction of

this Court, Petitioner should be required to post a reasonable bond to assure her faithful performance of this and further orders of this Court and it further appearing unto the Court that the distance between the residence of the parents of the minor children would necessitate a change in the visitation rights awarded to the Defendant by a final decree of this Court on August 7, 1959.

It Is, Therefore, Ordered, Adjudged and Decreed that Mrs. Lou Frissell Tighe, be, and she is hereby granted permission by this Court to remove her domicile, together with the minor children of the parties hereto, to Little Rock, Arkansas, upon her entering into bond in the sum of One Thousand Dollars ($1,000.00) with sufficient sureties thereon, to be approved by this Court, conditioned upon her faithful performance of this and all further orders of this Court and further conditioned upon her continuing submission to the jurisdiction of this Court.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe shall have the right to visit with said minor children at Little Rock, Arkansas, outside the home of the Petitioner on the first week-end of each and every month hereafter pending further orders of this Court and that this Court deems each of said week-ends to begin at the hour of 4:00 o'clock on Friday afternoon and shall end at 5:00 o'clock the following Sunday afternoon.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe shall have visitation rights with said minor children away from the State of Arkansas for three weeks during the month of June, 1960, the said three weeks beginning on the week-end following the end of the present school term and that the Defendant, Bowman Stirling Tighe, shall have further rights of

visitation with said minor children away from the State of Arkansas for the first three weeks during the month of August, 1960.

It Is Further Ordered, Adjudged and Decreed that the Defendant, Bowman Stirling Tighe shall have the right to bring said minor children to the State of Mississippi for one week, the said week to begin on December 26, 1960, pending further orders of this Court.

So Ordered, Adjudged and Decreed this the 28th day of April, 1960.

/s/ S. V. ROBERTSON, JR.
Chancellor

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Order is a true and correct copy as appears on record in my office in Min. Book 193, Page 107.

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T SCOTT, Chancery Clerk
By: /s/ Judith Thompson, D. C.

EXHIBIT 3b

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

IN THE MATTER OF
MRS. LOU FRISSELL TIGHE ..... Complainant
vs.
BOWMAN STIRLING TIGHE ..... Defendant

PERFORMANCE BOND

Know All Men by These Presents, that we, MRS. LOU FRISSELL TIGHE, Principal, COL. H. N. FRISSELL, MRS. IRENE S. FRISSELL, MRS. HARRIETT C. FINCHER, and A. A. FINCHER, Sureties, are held and firmly bound unto Bowman Stirling Tighe of Jackson, Mississippi, in the sum of One Thousand Dollars $1,000.00), to be paid unto the said Bowman Stirling Tighe, his executors, administrators, or assigns, to which payment well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such that if the above bound, Mrs. Lou Frissell Tighe shall at all times well and truly perform all of the obligations set forth in that certain decree entered by the Chancery Court of the First Judicial District of Hinds County, Mississippi, the 28th day of April, 1960 and all further orders entered by this Court pertaining to the care, custody, control and tuition of Lynn Adelaide Tighe and Bowman Stirling Tighe, Jr., minors and if the said Mrs. Lou Frissell Tighe shall

hereafter submit herself and the said minor children to the jurisdiction of the Chancery Court of the First Judicial District of Hinds County, Mississippi, then this obligation shall be void; otherwise to remain in full force and effect.

WITNESS OUR SIGNATURES, this the 5th day of May, 1960.

/s/ MRS. LOU FRISSELL TIGHE
Principal

/s/ H. N. FRISSELL
Surety

/s/ MRS. IRENE S. FRISSELL
Surety

/s/ MRS. HARRIET C. FINCHER
Surety

/s/ A. A. FINCHER
Surety

STATE OF MISSISSIPPI
COUNTY OF HINDS

PERSONALLY came and appeared before me the undersigned authority in and for the jurisdiction aforesaid, the within named Mrs. Harriet C. Fincher, and A. A. Fincher, Sureties, who each acknowledged that they signed and delivered the above and foregoing instrument of writing on the day and year therein mentioned.

/s/ MRS. HARRIET C. FINCHER
/s/ A. A. FINCHER

GIVEN under my hand and official seal of office this the 20th day of May, 1960.

s N. JANETTE MALONE
Notary Public

My Commission Expires:
January 25, 1964

STATE OF ARKANSAS
COUNTY OF

PERSONALLY came and appeared before me the undersigned authority in and for the jurisdiction aforesaid, the within named, Mrs. Lou Frissell Tighe, Principal and Col. H. N. Frissell and Mrs. Irene S. Frissell, Sureties, who each acknowledged that they signed and delivered the above and foregoing instrument of writing on the day and year therein mentioned.

s MRS. LOU FRISSELL TIGHE
s COL. H. N. FRISSELL
s MRS. IRENE S. FRISSELL

GIVEN under my hand and official seal of office this the 5th day of May, 1960.

s W. M. BARRIER
Notary Public

My Commission Expires:
December, 1960

APPROVED this the 23rd day of May, 1960.

s S. V. ROBERTSON, JR.
Chancellor

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Performance Bond is a true and correct copy as appears on record in my office in Bond Book 002, Page 406.

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: /s/ Judith Thompson, D. C.

EXHIBIT 4

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55727

MRS. LOU FRISSELL MOORE — Petitioner

vs.

BOWMAN STIRLING TIGHE — Respondent

ANSWER OF RESPONDENT TO PETITION TO MODIFY AGREED DECREE AND CROSS-PETITION

TO THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI:

Comes now the respondent, Bowman Stirling Tighe, and answering unto the Petition to Modify Agreed Decree, he answers and says:

1. He admits the allegations of Paragraph 1 of said petition.

2. He admits the allegations of Paragraph 2 of said petition.

3. He admits the allegations of Paragraph 3 of said petition.

4. He denies all and singular the allegations of Paragraph 4 of said petition, except as hereinafter admitted, however admitting that the minor children of the parties are eighteen months older than at the time the Agreed

Decree of December 28, 1960 was agreed to and approved by petitioner and her counsel and by respondent and entered in this cause as a final decree of the Court, but more specifically denying that there has been a material change in the circumstances of the parties or that there has been any substantial change whatever in said circumstances since the rendition of said Agreed Decree. He admits that said minor children, namely Lynn Adelaide Tighe, a girl, born December 31, 1953 and now nearing 9 years of age, and Bowman Stirling Tighe, Jr., a boy, born September 2, 1955, who will be 7 years of age in approximately one month, are too young to testify at the hearing of this matter, however, averring that they have continuously for the past eighteen months since the rendition of said Agreed Decree exhibited by their actions their actions their love for and desire to see and be with respondent at every opportunity. He admits that at the time of the rendition of said Agreed Decree and petitioner's agreement to the provisions contained therein her husband acted as her attorney, however he denies that her husband, namely, W. S. Moore, was too close to the situation to advise her properly as to her rights and as to the best interest of the children of the parties, he being a practicing attorney at law in the City of Jackson and of the Bar of the State of Mississippi, further showing that said Agreed Decree was approved by petitioner and her husband as her counsel, only after hours of conferences and negotiations by respondent with petitioner's husband on at least five or six occasions during a period of not less than six weeks time and during the months of November and December, 1960, and many telephone conversations, all of the same being arms length negotiations and further at a time when petitioner had on several occasions used the said W. S. Moore

as one of her legal counsel in matters before this Court and before the County Court of the First Judicial District of Hinds County, Mississippi during the year 1960 and for some time prior to her marriage to him and avers that said Agreed Decree was agreed to and signed by petitioner and her counsel only after every provision therein had been submitted to and discussed with her and her permission given to insert the same into said Agreed Decree was finalized as an agreement in the best interest of said children. That respondent avers that it is wholly immaterial that petitioner believed or was advised that respondent would not choose to exercise the rights of custody and visitation accruing to him by virtue of her approval of and agreement to the said Agreed Decree or would tire of the same, showing unto the Court that he loves his children very much, a fact well known at that time to both petitioner and her said counsel, and showing further that he desires to see and be with them at every opportunity. He admits that he has contended ever since he and respondent's counsel commenced their aforesaid negotiations toward said Agreed Decree that the schedule of custody and visitation contained therein is in addition to the "reasonable visitation" to respondent provided for in the Original Final Decree heretofore rendered in this cause on August 7, 1959 at the time of the divorce of the parties herein, showing unto the Court, that the language of the two aforesaid decrees is clear and unambiguous in this respect, and showing further that despite this petitioner has steadfastly and consistently insisted that respondent should have custody and visitation of said children only as provided in said Agreed Decree, and as a consequence thereof has been in contempt of this Court ever since the rendition of said Agreed Decree. That respondent, however, has made no

attempt whatever to enforce such rights to him for the sole reasons of avoiding further strained relations between respondent and petitioner and her husband such as existed prior to the rendition of said Agreed Decree and of avoiding further distasteful and unpleasant litigation in this cause necessary to enforce such rights. That respondent avers that all of his aforesaid negotiations with petitioners husband and counsel toward said Agreed Decree were with the specific understanding that after such strained relations had subsided with the passing of time that respondent would and could see and be with said children on occasions other than were scheduled in said Agreed Decree. That respondent avers further that at the time of said negotiations and the rendition of said Agreed Decree, it was absolutely imperative and necessary for a schedule of custody and visitation to be included in said Agreed Decree in order to insure those rights to respondent together with the insurance of same by the existing Performance Bond heretofore executed by petitioner and her sureties and filed in this cause in view of the aforesaid strained relations between the parties and the many attempts by petitioner to deprive respondent of his rights of reasonable visitation under the original final decree and other orders of this Court in this cause.

Respondent specifically denies that the custody and visitation established in said Agreed Decree is harmful or injurious to said children in any manner whatever, but to the contrary the same has been most beneficial to them and in their best interest and welfare.

Respondent also specifically denies that petitioner has, during the past eighteen months, made any real or substantial effort to cooperate with respondent in making said Agreed Decree work, but, to the contrary, she has

exhibited a definite inclination not to do so. He denies that the custody and visitation under the same is unreasonable to any extent whatever, or that it affects the welfare of the children in any manner except to their definite benefit and best interest.

5. He denies all and singular the allegations of Paragraph 5 of said petition, except as hereinafter admitted, more specifically denying that the custody and visitation under said Agreed Decree is impracticable or unworkable as alleged by petitioner, and denies that she does not enjoy benefit or pleasure with the children, showing unto the Court that under said Agreed Decree she has had custody and visitation with said children exclusively against respondent from 7:30 P. M. on each Sunday until 4:00 P. M. on each Friday, and again from 7:30 P. M. Saturday until 2:00 P. M. Sunday, with respondent's custody and visitation with said children being limited and confined substantially to not even a full weekend. That during her said custody and visitation, she has the opportunity to be with said children every day during the weeks of the school year from 2:30 P. M. each day until their bed time each night, and during the weeks of summer vacation on every day from morning until night, together with the pleasure of being with them at bed time and when rising in the mornings, while, on the other hand, respondent is limited in this pleasure substantially to only one night and day each week. He again denies that the children are adversely affected by said custody and visitation in any manner whatever, and, to the contrary, would show that said children have adjusted very well to the unfortunate situation of a broken home and a mother and father who are no longer together in the home with them; that the children themselves enjoy the time

spent with respondent as their father very much, and still love him very much.

Respondent denies the allegations of petitioner to the effect that she is not attempting to take away from respondent the right of reasonable visitation or the custody now in effect in favor of respondent, and avers that that is precisely what she is attempting to do. That her attempt to obtain a modification of said Agreed Decree is motivated entirely by her own personal selfishness and not by any desire whatever to see that the best interest of the children are served, all of which has been indicated heretofore by her abject refusal to cooperate with respondent in making said Agreed Decree work, and in previous concerted efforts and attempts on her part to alienate the affections of the children for respondent, as their father; all to their definite detriment in the premises and despite the fact that respondent has on every occasion where any ill feeling was likely to arise, studiously avoided any part in the same or any contact with petitioner which might have led to the same. That if petitioner is now dissatisfied with said Agreed Decree, such dissatisfaction has resulted solely because of her own actions in regard thereto.

6. He denies all and singular the allegations of Paragraph 6 of said petition except as hereinafter admitted, showing unto the Court that petitioner's husband purchased the home where they and the children now live at 1733 Wilhurst Street, Jackson, Mississippi, several months prior to the rendition of said Agreed Decree, and he was assisted by petitioner in choosing said home; that at the time of the rendition of said Agreed Decree, they already knew, knew of, or had made acquaintances with families in that immediate neighborhood, and knew that there were children in said neighborhood with whom the

children of respondent and petitioner would become friends; that, in any event, however, the custody and visitation under said Agreed Decree has not affected the adjustment of the children to any substantial degree whatever; respondent further showing that the children of respondent and petitioner also have many friends and schoolmates of their own age in the neighborhood where respondent lives at 1541 Winchester Street, Jackson, Mississippi, which location is but two blocks from the Moore home at 1733 Wilhurst Street, and but one block from and in the district of Pearl Spann Elementary School, where both children attend and have found friendships in school. That said children are very well adjusted also to this situation, and consequently are not adversely affected in any manner thereby.

Respondent specifically denies the allegation of petitioner to the effect that the children do not desire to leave their home on weekends, but to the contrary would show that they look forward to their weekend association with respondent, their father.

7. He denies all and singular the allegations of Paragraph 7 of said petition except as hereinafter admitted. He has no knowledge of the "nightly homework sessions" and "heavy homework load imposed by petitioner during the previous school year" upon said children at the home of petitioner which she avers, and he therefore denies the same and requires strict proof of the same; however, he does have knowledge of the progress and adjustment of said children as students at Spann School and he therefore denies that the children have done "substandard work" while there.

8. He denies all and singular the allegations of Paragraph 8 of said petition, more specifically denying again

that the children's relationship and enjoyment with friends of their own age has been affected to any substantial degree whatever by the custody and visitation under said Agreed Decree.

9. He denies all and singular the allegations of Paragraph 9 of said petition, more specifically denying that there has been any confusion to the children or that they are in any manner uncertain or emotionally unstable or have any lack of security to any extent as alleged by petitioner whatever, but, to the contrary, they are most well adjusted and emotionally stable, and to modify said decree and deprive the children of their association with respondent, whom they love, to any extent whatever would, in fact, have an adverse emotional effect on them. He denies that the fact that the children are now eighteen months older than at the time of the rendition of the Agreed Decree in any wise constitutes a material change such as would warrant a modification of said Agreed Decree.

10. He denies all and singular the allegations of Paragraph 10 of said petition except as hereinafter admitted. He admits that petitioner obtained an order on April 28, 1960, by ex parte application to this Court allowing her to remove said children to the State of Arkansas, in which order she was required by the Court to post a performance bond in the sum of $1,000.00 upon which her parents, both residents of the State of Arkansas, and Mrs. Harriet C. Fincher and A. A. Fincher, both residents of the First Judicial District of Hinds County, Mississippi, are sureties. He, however, specifically denies that there has been any material change since April 28, 1960, or since December 28, 1960, as alleged by petitioner, which would warrant a termination of the obligations of said bond by the Court, showing unto the Court that although peti-

tioner has remarried and returned to the State of Mississippi for residence, there still remains as a provision of said Agreed Decree, specifically requested by her, granting to her permission to remove said children from the State of Mississippi and beyond the jurisdiction of this Court, which was agreed to by respondent only in view of the existing performance bond. That further, petitioner's attitude and disposition from and after the date of said order of April 28, 1960 and to the present, except for a very short time during the negotiations toward said Agreed Decree, is indicative of her desire to withhold at every opportunity the custody and visitation of respondent with said children. That, accordingly, said performance bond should remain in effect; in order to insure the continuing jurisdiction of the Court over the children, and in order to retain in the Court the power to assert such jurisdiction, which the Court could not do in the absence of said performance bond. That for the Court to allow said bond to remain in effect will in no way operate to the detriment of petitioner or her sureties as long as petitioner remains in compliance with the Agreed Decree and other orders of the Court and at all times makes herself and said children amenable to the process and jurisdiction of this Court.

Respondent further denies that petitioner or her counsel have ever been under the impression that said bond was of no effect or has no legal significance as alleged by her, and, to the contrary, he avers that she has at all times been well aware of the terms, conditions, and obligations of said bond, respondent further averring that it is necessary that said bond remain in effect in order to insure jurisdiction to the Court as aforesaid and to insure compliance by petitioner with the Agreed Decree herein and other orders of this Court.

Respondent specifically denies that he has ever made any threats "to sue respondent's sureties" on said bond. Respondent finally denies that petitioner is entitled to any modification whatever, either of the said Agreed Decree of December 28, 1960, or of the order of April 28, 1960, or to the relief of termination of said bond, and denies that petitioner is entitled to any relief whatever upon said petition, respondent averring said petition only a frivolous attempt to obtain modification of the aforesaid Agreed Decree and order and a consequent imposition on the administration of justice in this Court.

SPECIAL PLEA OF RES JUDICATA

11. That on December 28, 1960, the aforesaid Agreed Decree was rendered by this Court in this cause, this Court then having full and complete jurisdiction to render the same as set forth therein, and was entered upon the minutes of the Court in Minute Book 200 at Page 561, and that the parties thereto are the same as the parties herein. That said Agreed Decree is hereby made a part hereof by reference thereto, the same being a part of the Court file in this cause.

12. That all matters and issues raised by petitioner herein were the same as in said Agreed Decree and were either raised in said Agreed Decree and finally determined, or could have been raised therein and finally determined; all of which were matters and issues in regard to the merits of the cause.

13. That said Agreed Decree is a final decree of this Court and no appeal can be or has been taken therefrom.

14. That, therefore, all matters and issues raised or attempted to be raised by petitioner in her said petition are now res judicata, including both her attempt to obtain a modification of the custody and visitation of the minor

children of the parties under said Agreed Decree, and her attempt to have the Court terminate the obligations of the performance bond heretofore executed by her and her sureties; those matters being wholly foreclosed by said Agreed Decree, and there being present no material nor substantial change in the circumstances of the parties warranting such action by the Court.

And now having fully answered said petition, respondent prays to be dismissed therefrom with his costs, and hereby makes his answer a cross-petition against petitioner and, thereupon, cross-petitioner shows unto the Court the following:

1. That he hereby makes all and singular the denials and averments of the foregoing answer a part of this cross-petition to the same extent and as fully as if repeated herein.

2. That, more particularly, he repeats herein and makes a part hereof and calls attention to Paragraph 4 of said answer wherein he avers the complete unwillingness of cross-respondent to allow to him the reasonable visitation due him under the original Final Decree rendered in this cause at the time of the divorce of the parties on August 7, 1959; the custody and visitation to cross-petitioner scheduled in the said Agreed Decree being in addition to such reasonable visitation as is set forth in said Agreed Decree in clear and unambiguous language.

3. That the circumstances existing at the time that cross-respondent and cross-petitioner agreed to and approved said Agreed Decree and immediately prior thereto during the conferences and negotiations by cross-petitioner with cross-respondent's counsel and husband, which, on one occasion included a conference with all present, were such that cross-respondent and cross-

respondent's counsel and husband indicated to cross-petitioner the supposed complete willingness of cross-respondent for cross-petitioner to have custody and visitation with the children at all reasonable times despite what might be scheduled in said Agreed Decree, and in addition thereto, and as well the supposed desire of cross-respondent to cooperate with cross-petitioner on a friendly basis in making said Agreed Decree work, and in allowing the strained relations in the past between the parties to subside through such cooperation and the passing of time. That at said time, cross-petitioner did in fact believe that cross-respondent and her counsel and husband were sincere in this; however, later learning to the contrary that they were not, or at least, that cross-respondent herself was not. That to the contrary and as a matter of fact the converse of everything just mentioned is true, and cross-respondent has, on repeated occasions, indicated her steadfast desire to limit the custody and visitation of cross-petitioner with said children at every opportunity; to alienate the affections of said children for cross-petitioner, their father, and to make no affirmative step whatever toward cooperation with cross-petitioner in either making said Agreed Decree work or in planning for additional custody and visitation of cross-petitioner with the children at reasonable times and when it would be to the best interests of said children.

4. That it would be to the definite best interest and welfare of said children for them to be able to see their father on other reasonable occasions, and more particularly during their summer vacations from school, with whom, and at the behest of whom, they will be able to take part in and engage in activities of which they otherwise would not have the opportunity to so engage in, because of the refusal of cross-respondent to allow them

to so do in keeping with the spirit she has heretofore exhibited as set forth hereinabove; that for said children to have the opportunity to develop with this added advantage would also be to their best interest and welfare. That cross-petitioner loves his children very much, and it has been a great burden to him for the past eighteen months in not being able to see his children from Sunday until Friday of each week, and to their disadvantage as well in not being able to see their father.

5. That, accordingly, in view of petitioner's refusal to abide by the terms of said Agreed Decree, the Court should determine and prescribe such additional, reasonable visitation as would be in the best interests of said minor children, by providing a further schedule of such additional visitation, in view of the circumstances set forth above and in view of the failure and refusal of cross-respondent to allow the same to cross-petitioner on a voluntary basis.

WHEREFORE, PREMISES CONSIDERED, cross-petitioner prays that this cross-petition be received and filed and that the same be heard at final hearing this day together with the petition and answer herein, said cross-petition raising no new issues whatever not already before the Court, and, upon such final hearing, cross-petitioner prays the Court to enter a decree to the extent only of providing a schedule of the additional custody and visitation for cross-petitioner with said children to which he is entitled by virtue of said Agreed Decree, all in the best interest and welfare of said children.

And cross-petitioner prays for general relief.

BOWMAN STIRLING TIGHE
Respondent and Cross-Petitioner

By: s/ Roger C. Landrum
His Attorney

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named Cross-Petitioner, Bowman Stirling Tighe, who, first by me being duly sworn, stated on oath that the matters and facts set forth in the above and foregoing cross-petition are true and correct as therein stated.

/s/ BOWMAN STIRLING TIGHE

SWORN TO AND SUBSCRIBED BEFORE ME, this the 27 day of July, 1962.

/s/ ALINE J. COLLUM
Notary Public

My Commission expires July 26, 1965

CERTIFICATE

I, Roger C. Landrum, attorney for respondent and cross-petitioner, hereby certify that I have this day personally handed to Honorable W. S. Moore, solicitor of record for petitioner and cross-respondent, Mrs. Lou Frissell Moore, a true and correct copy of the above and foregoing answer and cross-petition, this the 27 day of July, 1962.

/s/ ROGER C. LANDRUM

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Answer, etc., is a true and cor-

rect copy as appears on record in my office in Jackson, Miss., Book ....., Page .....

Given under my hand and official seal of office this the 7th day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: /s/ Judith Thompson, D. C.

EXHIBIT 5

"TESTIMONY ON PETITION TO MODIFY AGREED DECREE

"BY THE COURT: I want to make a statement for the record myself. This schedule of visitation set forth in this Agreed Decree would take both a Philadelphia lawyer and a C. P. A. to figure out exactly how to work it. *The Court takes judicial notice that this Agreed Decree of December* 28, 1960 *is not for the best interest of these children, and that, of course, is what the Court is concerned with*, and I might say that the Supreme Court itself spoke on many occasions against visitation of this sort, and *it is not going to take a lot of testimony from neighbors, psychiatrists*, psychologists or child experts *to convince this Court that we should start all over again and knock out this schedule of visitation that is set up.* It is the most complicated and the most intricate system of visitation that I have ever seen, and the Court takes judicial notice that it is not good for children to swap their custody 50 weeks out of the 52 where the children are with the mother Monday, Tuesday, Wednesday and Thursday and then are with the father on Friday and Saturday and then back with the father on Sunday of each week. I just want that statement to clarify this record and to say that any parent with children could make the same statement.

"*Now, with that in mind, I don't know whether that is going to simplify it or not, but I don't intend to hear much testimony on this in defense of this Agreed Decree by virtue of the fact that it was agreed to.* I told Counsel at the time that this Decree was presented that it would not work, and time has borne that out. With that in mind, I will give you a chance now to check on your witnesses. * * * (R. 63-65)

BY MR. LANDRUM: Now the Court has announced in effect his interpretation of the Decree, but the Respondent has certain witnesses to offer on the subject and we have had these witnesses subpoenaed returnable to this Court and we will have them available to testify, and *we would at least like to offer them for the purpose of making our record in this case*, and the Court has announced, as I understand it, that this matter will be terminated by noon, and I can tell the Court in all honesty I don't know how we can do that, because of the fact that, unless the Court orders me to stop questioning a witness I am not going to be able to conclude the presentation of my case by noon.

"BY THE COURT: Well, I might have to do like Judge Stricker used to do, say 'I've heard enought', but we'll see, and we won't stop right at noon. We might run on until two or two-thirty, but that will be sufficient." (R. 65-66) (Emphasis added)

EXHIBIT 6

"BY THE COURT: For what purpose is this testimony being elicited?

"BY MR. LANDRUM: This testimony, Your Honor, is being elicited for the purpose of showing that the Petitioner herself is to a great extent responsible for any failure that there might have been for this agreement working.

"BY MR. MOORE: Is it the contention that she has not complied with the decree?

"BY MR. LANDRUM: In certain particulars, yes, sir. I was going into that.

"BY THE COURT: As I understand your question, you are talking about additional visitations or modifications of this Agreed Decree, is that correct, additional visitations or changes in the schedule?

"BY MR. LANDRUM: Yes, sir, I was going into the fact that she agreed that he could have these specific times in addition to the reasonable visitation provided in the original decree, and further, in an effort to show that Stirling had certainly been much more elastic in working with her than she has with him, that she has come much nearer to requiring this thing to be complied with to the letter of the law than he has.

"BY MR. MOORE: If the Court please, I think that the Court has had this case since May of 1959, and I think the Court realizes why it is necessary that specific visitation be established between these two parties, because this isn't the first time this matter has been before the Court, and I think the Court will realize that it is impossible for these parties to have a flexible visitation schedule. Based on that, we object to any attempt; any

questions, any additional questions in regard to this matter of attempts by either one of them to modify the terms of the decree on small matters.

"BY MR. LANDRUM: Well, Your Honor, I understand that this proceeding was to modify the decree.

"BY THE COURT: *Yes, sir, that's the way I understand it, and the Court intends to modify the decree as far as this whole schedule is concerned. We are going to set aside that schedule and start over, and as the Court stated in the beginning, in this Agreed Decree the schedule of visitation speaks for itself. The Court takes judicial notice that it is not for the best interest of the children. If that is pre-judging the case, I prejudge it.*

"BY MR. LANDRUM: Well, Your Honor, with all deference, and this Court knowing that I am absolutely new in this case, the only way I know how to try any law suit that I have is to put it on to the best of my ability

. . . . . .

"BY THE COURT: That's right.

"BY MR. LANDRUM: (Continuing) . . . that is what I am attempting to do here, and I will state to the Court quite frankly that *the petition as drawn does not in my mind of itself justify at this early time a change in an Agreed Decree.* I realize that *the Court might have knowledge of facts that I do not have* which would *prompt the Court to make the statement that he did,* but by reason of my lack of knowledge of the facts on *which the Court has already apparently made up his mind,* I still say that I see no alternative other *than going ahead and making my record.*

"BY THE COURT: *That is perfectly all right;* but I want you to know that the *Court is not laboring under the disability that you are in not having come into this case from the beginning.*

"BY MR. LANDRUM: Yes, sir.

"BY THE COURT: *I have lived with this case since May 8, 1959,* and we *have had a number of extended hearings on it. I think I know about all that there is to know about the case, and all I desire at this time is to be brought up to date on it.*

"BY MR. LANDRUM: With respect to that Your Honor, I understood that there had not been one word of testimony given in this Court since the original divorce trial.

"BY THE COURT: That, my friend, is where you are mistaken. (Laughs)

"BY MR. LANDRUM: May I have the Court file, Your Honor?

"BY MR. MOORE: I think, Your Honor, that we could possibly go on with the cross-examination. It is now eleven o'clock, and we want to get through with our testimony at least before twelve.

"BY THE COURT: *I realize that I am placing Counsel at a disadvantage with my remarks, but I feel very strongly in this case as to what should be done,* both from the standpoint of a father and as a Judge, and I feel that a mistake was made when this Agreed Decree was entered, I feel that it was a mistake on the part of the Court, and I feel that it was a mistake on the part of the parties, and from the standpoint of a father, with some knowledge of the psychiatry and psychology of children, I hope, I make those remarks, but I do want

to say that I am sympathetic with Counsel and I realize what a disadvantage I am placing him under.

"BY MR. LANDRUM: Judge, I was just thinking to myself, I have gone into a lot of lawsuits that I thought I was going to lose, *but this is the first one I have ever had the Judge tell me I was going to lose before I started trying it, but I still think* that in view of, as you refer to it, my limited knowledge of the case and all I have to go on is the pleadings, plus what background information I picked up, *I have got to make a record on the case.*

"BY THE COURT: Yes, sir. This case has been to the *Supreme Court before, and I assume it will go again.*

"BY MR. LANDRUM: Yes, sir, I'm right sure it will. I had been confronted with an objection, Your Honor, and with this *encounter with the Court*, I don't remember what my question was now. May I have that question read back? (R. 115-119)" (Emphasis added)

EXHIBIT 7

"Q. Are you a participant in any manner in the request of this petition that the appearance bond be cancelled? Are you familiar with the fact that . . .

"A. Yes. I was under the impression that that bond was in effect while the children were out of the jurisdiction of this Court in Arkansas, living in Arkansas at their family's home—I mean their grandparents' home—and I see no need for the bond now and would like to have it dismissed. I can speak for my mother and father on that.

"Q. You have just returned from the State of Arkansas yourself . . .

"A. That's right.

"Q. . . . and you were up there, I believe, twice last year, is that correct?

"A. I believe so.

"Q. And when you get into the State of Arkansas, there is nothing to compel you to come back, not even your husband is there?

"BY THE COURT:

I don't care to go into any testimony on that. The Court was the one that entered the decree on the bond, and the decree on that speaks for itself. It is a reasonable bond, and *I don't care to go into that now.*

"BY MR. LANDRUM:

I understand, Your Honor, that this is a part of the relief sought in this petition.

"BY THE COURT:

Yes, sir.

"BY MR. LANDRUM:

Is the Court ruling on that at this time, so as to pretermit that from the purview of this.

"BY THE COURT:

I was under the impression that that bond cancelled itself out, the reason for it having ceased to exist, and, therefore, if it is technically in the petition for a formal cancellation, then so be it.

"BY MR. LANDRUM:

Is the Court ruling, therefore, that the bond will be cancelled?

"BY THE COURT:

Yes, sir.

"BY MR. LANDRUM:

Is the Court ruling that we are not to go into that matter any further and make a record on it?

"BY THE COURT:

Yes, sir, that is exactly right. (Emphasis added)

"BY MR. LANDRUM:

May I just state in the record what our position in respect to that is, Your Honor?

"BY THE COURT:

Yes, sir.

"BY MR. LANDRUM:

The Respondent takes the position that there is still a need for the bond, as evidenced by the fact that this Petitioner has removed herself and the children from the

State of Mississippi to the State of Arkansas three times within the last year and a half, and that in the course of the hearing the Respondent would present his testimony and views as to why this bond should be kept in full force and effect.

"BY MR. MOORE:

I think the Court's ruling is when the children were brought back from Arkansas, it is the Court's ruling that the bond automatically terminated then. Is that correct, Your Honor? Is that your ruling?

"BY THE COURT:

In order to clarify that, let me read from the Order Granting Permission to Take Children out of Jurisdiction of Court, which was filed on April 28, 1960: 'And it further appearing unto the Court that since Petitioner's change of residence would remove said minor children beyond the jurisdiction of this Court, Petitioner should be required to post a reasonable bond to assure her faithful performance of this and further orders of this Court and it further appearing unto the Court that the distance between the residence of the parents of the minor children would necessitate a change in the visitation rights awarded to the Defendant by a final decree of this Court on August 7, 1959,' and since the rendering of that decree, which was for a change of residence from Jackson, Mississippi to Little Rock, Arkansas where Mrs. Lou Frissell Moore would move with her two children—Mrs. Lou Frissell Tighe at the time would move with her two children—since that time, since she has married, moved back into Jackson, Mississippi and is making her permanent home here, the Court has considered that that provision for a performance bond has gone out the win-

dow and the reason for it has ceased to exist, as clearly set forth in the order entered on April 28, 1960.

"BY MR. LANDRUM:

Your Honor, we would like to make as exhibits, for the purpose of preserving our record, copies of the order and bond to which the Court just referred.

"BY MR. MOORE:

They are adopted in our petition by reference, Your Honor.

"BY MR. LANDRUM:

I always wonder whether that takes them up on appeal.

"BY THE COURT:

That's right. There is some doubt, so let the record reflect at this time that the order and the bond with reference to the change of residence from Jackson, Mississippi to Little Rock, Arkansas are made a part of this record by reference.

("Whereupon the instruments referred to were received in evidence by reference, and have been previously copied herein. For the order, see Pages 11-13 of this record. For the bond, see Pages 14-16 of this record.")

EXHIBIT 8

BY THE COURT:

The history of this case has been a long one. It was begun officially in this Court on May 8, 1959 with the filing of the Bill of Complaint for Divorce by Mrs. Lou F. Tighe and, of course, has continued down to this day. This Chancellor has heard all of the evidence adduced on former trials of different phases of this case. There have been seven decrees or orders entered in this case beginning with the decree of August 7, 1959 when a divorce was awarded to the Complainant, Mrs. Lou Frissell Tighe, and reasonable visitation with the children was granted to Respondent, Stirling Tighe, and ending with the Agreed Decree of December 28, 1960. There were other orders entered on December 18, 1959; April 28, 1960; October 5, 1960; October 17, 1960; and October 24, 1960. In between these orders and hearings, the Court has conferred numerous times in Chambers with Counsel for one or the other of the parties to this suit, and even with the parties themselves, in sincere attempts to work out solutions to their problems without further bitter Court trials.

This Chancellor was not being facetious this morning when he informed new Counsel for Stirling Tighe that this Chancellor is not suffering from the disability of present Counsel in just coming fresh into this case. This Court has lived with this case for three full years.

I read from the Decree now being questioned the full schedule of visitation by the Respondent, Stirling Tighe, to show the impracticability and unworkability of the formula therein provided:

"1. *On Regular Weekends*, to include every weekend in the calendar year except as hereinafter set forth where inconsistent with the same:

a. From 4:00 p.m. on Friday until 7:30 p.m. on Saturday, and

b. From 2:00 p.m. on Sunday until 7:30 p.m. on Sunday,

c. Provided, however, that Complainant may by 10 days notice in writing to the Defendant elect to retain custody and visitation of said minor children for an entire weekend for any two regular weekends during the year not adjacent to a holiday or special day, and not on consecutive weekends, from 4:00 p.m. on Friday until 7:30 p.m. on Sunday and Defendant, on the other hand, may elect to do the same by giving such notice to Complainant.

"2. *On Special Weekends and Holidays*, to include those weekends and holidays as hereinafter set forth:

a. From 4:00 p.m. on the last day of school for children preceding holiday until 7:30 p.m. on day preceding first day of school for children after holiday; provided, however, that when such weekend or holiday does not occur during regular school term it shall commence at 4:00 p.m. two days prior to holiday day and end at 7:30 p.m. two days subsequent to such holiday day. Said special weekends and holidays are enumerated as follows:

(1) Holiday from school adjacent to or connected with a regular weekend.

(2) Spring Holidays or Easter (with the exception that the provisions of 1.b. supra shall

apply as to the custody and visitation on Easter Sunday.)

(3) Fourth of July Holidays.

(4) Labor Day Holidays.

(5) Thanksgiving Holidays.

Provided, however, that the same shall apply only in even numbered years as to (3) and (5) and in odd numbered years as to (4); provided further, however, that Defendant shall have custody and visitation of said children on two additional weekends similar in length to (3) and (5) in odd numbered years and one additional weekend similar in length to (4) in even numbered years, by election to do so in the manner as provided by l.c. supra.

3. *During Christmas Vacation and Holidays* to include the following:

a. From 2:00 p.m. to 7:30 p.m. on December 25.

b. From 9:00 a.m. on December 26 to 2:00 p.m. on December 31.

4. *On Additional Special Days* in addition to the above:

a. January 5—4:00 p.m. to 7:30 p.m.

b. April 24—4:00 p.m. to 7:30 p.m.

c. Father's Day—7:30 p.m. on Saturday preceding to 7:30 p.m. on Sunday.

d. Mother's Day—No custody and visitation to Defendant on Sunday.

e. September 2—2:00 p.m. to 7:30 p.m. (when such date is on a weekend, Complainant shall have cus-

tody and visitation of said children from 2:00 p.m. to 5:00 p.m.)

f. October 31—6:00 p.m. to 6:30 p.m.

g. November 19—4:00 p.m. to 7:30 p.m.

"5. Said custody and visitation of said minor children as set forth herein shall be available by each party to the other in Jackson, Mississippi, and shall be effective from and after January 3, 1964."

This is the most complicated and detailed schedule of visitation and formula for determining visitation that I have ever seen in over seven years on the Bench. It would take a Philadelphia lawyer along with a C.P.A. to keep up with this complicated and confusing formula, with its reference to "even numbered years as to (3) and (5) and in odd numbered years as to (4)," and then "provided further, however, that Defendant shall have custody and visitation of said children on two additional weekends similar in length to (3) and (5) in odd numbered years and one additional weekend similar in length to (4) in even numbered years, by election to do so in the manner provided by l.c. supra." That is just one paragraph of this Agreed Decree.

Now when this Agreed Decree was presented to the Court in Chambers by W. S. Moore and Stirling Tighe, Lou Frissell Tighe and Stirling Tighe were engaged in litigation growing out of their marriage and its dissolution in the Supreme Court of Mississippi, the Chancery Court of the First Judicial District of Hinds County, in the Hinds County Court and in the Justice of the Peace Court. That sets a first for a case of this kind.

This Court, as it recalls, advised the parties at the time this Agreed Decree was presented to the Court that it was

an impractical decree and that it was unworkable, in the Court's opinion, but it was represented to the Court that it was the result of conferences among Lou Tighe, Stirling Tighe and W. S. Moore, and that in the interest of disposing of all litigation between the parties this Agreed Decree should be signed by the Court and given a chance to see whether it would work. The Court, against its better judgment, signed this Decree. The Court should not have done so. The Court admits its mistake in signing this Decree.

This Court momentarily lost sight of the sole and only criterion which should have been used in considering this Decree, and that is, what is for the best interests of these two little children. Why, under this Decree, these two little children change their place of abode twice each week throughout each year. They are shunted from one house to another about 100 times each and every year. About the time they light in one spot, it's time for them to move to another. This obviously is not conducive to stability of character and the peace of mind of these little children, no matter how one parent or would-be child expert might attempt to rationalize on it.

These little children have lived under and been governed by the terms of this strange Decree from December 28, 1960 down to this date. It is a sign of the amazing adaptability of children that these two children have come along as well as they have, under these strained and tortuous conditions imposed upon them by their parents and this Court.

Much has been said about the interests of the children being promoted by devising times for visitation when the father could be with them; in other words, on week-ends when the father is off from work. That might suit the

father a great deal better than middle of the week visitations, and the Court will consider this in setting up visitation, but the best interest of these children is not being served by changing their custody twice each week, even if it does occur on the week-end.

Frankly, the Court doesn't know exactly how to go about amending this vastly complicated and detailed system of visitation. The Court feels that the slate should be wiped clean and we should start all over again in trying to figure out a simple and reasonable schedule of visitation.

The Supreme Court has spoken out on this question of changes in the custody of children of a broken home. The Court recalls one case in which the Supreme Court said that six months with one parent and six months with another was not a good division where the custody was changed during the nine-month school term, and the Supreme Court, as the Court recalls, changed it on its motion to nine months with one parent and three months with the other.

After all, as is stated in the case of *Evans vs. Evans*, and this is from the main opinion as written by Justice Anderson: "In any contest concerning the custody of a minor child, the best interests and welfare of the child are the matters of chief importance," and further, "and if the welfare of the child requires it, to modify the decree and make a changed or altogether different disposition of the custody of the child. There would seem to be no question but that the courts have the power to do this . . ."

Now that was from the majority opinion, and then from Justice Griffith's specially concurring opinion, which the Court notes was concurred in by Justice McGehee and Chief Justice Smith:

"What happened here was that it was found during and by the experience of the six months' time, the arrangement of the October decree was one which was impracticable and unworkable if either the child or his father were to obtain any benefit or pleasure from their association with each other, and the court upon a more mature consideration and reflection saw that such was the case and modified the decree so as to give such time to the father as would make the association of some benefit to the child, rather than scarcely any at all as resulted from the October decree, and hence the Court modified the decree so as to allow the father the temporary custody during the vacation month of July," and further "Under modern authorities this minor measure of modification is allowable even in the absence of any substantial changes in the surrounding circumstances when viewed merely from the factual standpoint."

This Court feels that a mistake was made in entering that Decree of December 28, 1960 and that, upon a more mature consideration by the Court, and nineteen months' effort of the parties to live with this Decree, and greatly changed circumstances of the parties, on these bases this Decree should be modified.

This Court feels that custody, control and tuition of these two children should be with the mother except for the following times when it should be with the father:

On the first week-end of each month from 4:00 p.m. on Friday to 7:00 p.m. on Sunday night; on the third Saturday of each month from 2:00 p.m. till 7:00 p.m.; from July 1st to August 15th of each year; at Christmas time each year, from 9:00 a.m. on December 26th till noon, December 31st.

With reference to the performance bond provided for in the Decree of April 28, 1960 when the Court acted on the Petition of Mrs. Lou Frissell Tighe as a single woman for authority to move back to Little Rock, Arkansas with the two children to be with her parents over there, that, provision, by the construction of both parties; was written out and not considered further when Mrs. Lou Frissell Tighe Moore moved back to Jackson and took up her permanent abode here. The reason for requiring such a performance bond ceased to exist when she moved back permanently into the jurisdiction of this Court. A performance bond is not required of Stirling Tighe as long as he lives here in Jackson, and surely a performance bond should not be required of her after she moved back to Jackson. The Court feels that the prayer of the petition that this bond be cancelled and the sureties on this bond discharged, should be granted.

"Court costs in this matter should be taxed against the Petitioner. I am granting the relief asked for by her, so I feel that she should pay the costs of the Petition, process thereon, and the Decree in accordance with this opinion."

EXHIBIT 9

"BY MR. LANDRUM:

Now we would like to move for some special findings of fact.

"BY THE COURT:

This comes after the opinion from the Bench, and I will not entertain that.

"BY MR. LANDRUM:

Your Honor, may I show my motion in full on the ruling and then get your ruling? I didn't understand that you had overruled my motion.

My motion is: Comes now the Respondent and moves the Court to make special findings of fact as to the following things:

1. Whether Respondent is a fit and proper person to have custody of said minor children;

2. Whether or not the Court finds as a fact that the provisions of the Agreed Decree of December 28, 1960 have had a harmful effect on said children;

3. Whether the Court finds any material change in circumstances since the Agreed Decree of December 28, 1960.

That was the substance of our motion, Your Honor.

"BY THE COURT:

All right. I will rule on those.

"BY MR. MOORE:

If the Court please, in regard to that first finding of fact, that goes a whole lot deeper, I think, than maybe even Mr. Landrum recognizes. There never has been a

determination of whether or not Stirling was a fit and proper person to have the custody of these children, and in the event that anything ever happens where Lou made the slightest little slip anywhere or I made the slightest slip anywhere, I feel sure that there would be a petition over here to divest her of that custody, and if you made a finding now that he is a fit and proper person to have the custody of the children, then we would be bound forevermore not to go all the way back and show you to the contrary. Now that's a loaded question if there ever was one, and I don't think it is necessary for this Court to rule on it in this case whatsoever. There has been no evidence that he was unfit; all the evidence was that he is fit, but I don't think it would help these children to have such a ruling at this time by the Court.

"BY THE COURT: . .

The Court would not have granted any custody to the Respondent or any custody to the Petitioner if it had not felt that both parties were fit and proper persons to have the custody decreed by the Court. That disposes of that.

Now the next question was . . .

"BY MR. LANDRUM:

Whether there has been any harmful effect on the children under the terms of this Decree.

"BY THE COURT:

It is abundantly clear that the Court considered that very Decree *from the beginning* as not for the welfare and in the best interest of these little children, and it would be *impossible to answer that question* as to whether there are latent, harmful effects as far as the children are concerned. *The Court takes judicial notice*, and the testimony so shows, that changes in custody of children twice

in each week of each year, and in addition to that at other times as provided in the Agreed Decree, are not, for the best interests of the children.

Now as to the third, "Whether the Court finds any material change in circumstances since the Agreed Decree of December 28, 1960," the Court finds that the experience of the parties in trying to work under this long and complicated and detailed Decree, and the knowledge of the Court as a father of three children and having served on the Bench for over seven years and hearing numerous cases of this kind, based on that knowledge and the experience of the parties for nineteen months in attempting to work under an unworkable and impracticable and impossible Decree, that there necessarily was a material change in the circumstances of the parties. ..." (Emphasis added)

EXHIBIT 10

"BY MR. MOORE: I believe also, Your Honor, that it would be proper to show with that there was no *motion whatsoever to get you to recuse yourself because of any bias.* I think that certainly ought to go with it. The Respondent never asked for it during the proceeding, any part of it.

"BY THE COURT: Well, of course, there is no motion among the pleadings and nothing in the record to that effect, so I expect it would not be proper to show affirmatively a complete absence of such a motion. The record will reflect the complete proceedings when it goes up. The Court also wants to go in these excerpts, as a matter of making a full disclosure, that this trial began at about quarter of ten this morning, and the Court in its opening remarks stated that it was the Court's intention to finish by noon, and then that remark was amended to say that we would end by two-thirty, but that this trial has extended on until five minutes of six, and that this Court has spent what it considers a rather full day on the trail of this matter, *for whatever effect it may have on my opening remarks.*

"BY MR. MOORE: Did you note that part about no motion to recuse yourself?

"BY THE COURT: What I meant was that there is no motion in the record, and therefore the record when it is written up will not show a motion for the Court to recuse itself, but if it goes up on this fragmentary statement from the record, I think that fragmentary statement should say that there was no motion made by Counsel for Respondent for the Court to recuse himself." (Emphasis added)

EXHIBIT 11

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 55,727

MRS. LOU FRISSELL MOORE — Petitioner

vs.

BOWMAN STIRLING TIGHE — Defendant

DECREE MODIFYING FORMER DECREES

This Cause having come on for hearing on July 27, 1962, a former day of this, the June, 1962, term of this Court, upon the petition to modify agreed decree of Petitioner, Mrs. Lou Frissell Moore, and citation thereon issued and served upon Respondent, Bowman Stirling Tighe, and upon the answer of Respondent to petition to modify the agreed decree and cross-petition and special plea of res adjudicata contained therein, and both parties having appeared in person and by counsel, and having announced ready for trial, the Court allowed said cause to proceed to hearing, with evidence and testimony, both oral and documentary having been adduced in open court upon said pleadings, including the special plea of res adjudicata contained in said answer, the Court holding that said special plea of res adjudicata should be considered by the Court along with the evidence and testimony upon the merits of the cause, and that a ruling would be given upon the special plea of res adjudicata at the conclusion of the evidence and the testimony, in the same manner as if same had been called up and presented for hearing prior to the case on its merits; at the con-

clusion of said evidence and testimony, and argument of counsel, the Court found that there has been a material change in circumstances since the entering of the order granting permission to take children out of jurisdiction of court was entered on the 28th day of April, 1960, and a material change of circumstances has taken place since the entering of the agreed decree on the 28th day of December, 1960, and the best interest of the children and the parties would be served if the Order and Decree were modified.

It Is Therefore Ordered, Adjudged and Decreed that the Order granting permission to take children out of jurisdiction of court entered on the 28th day of April, 1960, of record in Minute Book 198 at Page 107 of the Minutes of this Court be, and the same is hereby modified to the extent that complainant and petitioner, Mrs. Lou Frissell Moore, is relieved of the requirement to post a bond to assure her faithful performance of the orders of this Court, and the bond of the complainant and petitioner, Mrs. Lou Frissell Moore, dated May 5, 1960, approved May 25, 1960, of record in Miscellaneous Bond Book 2 at Page 406 be, and the same is hereby cancelled, and the sureties, H. N. Frissell, Mrs. Irene S. Frissell, Mrs. Harriet C. Fincher and A. A. Fincher, be, and they are hereby released from further liability thereunder, except any liability which may have accrued during the time such bond was in effect.

It Is Further Ordered, Adjudged and Decreed that the agreed decree entered in this cause on the 28th day of December, 1960, and of record in Minute Book 200 at Page 561 of the Minutes of this Court be, and the same is hereby modified and changed to the extent that the second paragraph of the agreed decree of December 28, 1960, appearing on Page One thereof, is deleted; that Pages

Two and Three are deleted; Paragraph 4.f., Paragraph 4.g., and Paragraph 5 appearing on Page Four of the agreed decree are deleted; the paragraph which starts on Page Four and ends on Page Five of the agreed decree relative to the removal of the minor children beyond the jurisdiction of the Court is modified, over the specific objection of respondent, to the extent that hereafter there shall be no specific limitation on the temporary removal of the minor children beyond the jurisdiction of the Court as long as said temporary removal does not conflict with the custody and visitation of the defendant and respondent, Bowman Stirling Tighe; and in the place and stead thereof, this Court hereby establishes visitation and custody which, in the opinion of this Court, best meets the interest and welfare of the two minor children of the parties, namely, Lynn Adelaide Tighe, a girl, born December 31, 1953, and Bowman Stirling Tighe, Jr., a boy, born September 2, 1955.

It Is Further Ordered, Adjudged and Decreed that the complainant and petitioner, Mrs. Lou Frissell Moore, be, and she is hereby ordered to make the minor children available for visitation and custody with the defendant and respondent, Bowman Stirling Tighe, at her usual place of residence in the City of Jackson, Mississippi, on the dates and hours specified in this decree, and the defendant and respondent, Bowman Stirling Tighe, be, and he is hereby ordered to return the minor children upon the termination of such visitation and custody at the usual place of residence of the complainant and petitioner, Mrs. Lou Frissell Moore, in the City of Jackson, Mississippi, on the dates and hours specified in this decree.

It Is Further Ordered, Adjudged and Decreed that the defendant and respondent, Bowman Stirling Tighe, shall

have the right to visit with said minor children outside the home of the complainant and petitioner, Mrs. Lou Frissell Moore, on the first week-end of each and every month hereafter pending further orders of this Court, and that this Court deems each of said week-ends to begin at the hour of four o'clock p.m., on the first Friday of each and every month and shall end at seven o'clock p.m., on the following Sunday night; and the defendant and respondent, Bowman Stirling Tighe, shall have the right to visit with said minor children outside the home of the complainant and petitioner, Mrs. Lou Frissell Moore, on the third Saturday afternoon of each and every month hereafter pending further orders of this Court and that this Court deems each of said third Saturday's visitation to begin at the hour of two o'clock p.m., on Saturday afternoon and shall end af seven o'clock p.m., that same Saturday night; and the defendant and respondent, Bowman Stirling Tighe, shall have the exclusive care, custody and control of said minor children outside the home of the complainant and petitioner, Mrs. Lou Frissell Moore, from nine o'clock a.m., on the 1st day of July of each and every year until seven o'clock p.m., on August 15th of each and every year pending further orders of this Court; and the defendant and respondent, Bowman Stirling Tighe, shall have the right to visit with said minor children outside the home of the complainant and petitioner, Mrs. Lou Frissell Moore, from nine o'clock a.m., on the morning of December 26th of each and every year until twelve o'clock noon on December 31st of each and every year, until further orders of this Court; and the same is all of the custody and visitation rights of the minor children awarded to the defendant and respondent, Bowman Stirling Tighe.

It Is Further Ordered, Adjudged and Decreed that the complainant and petitioner, Mrs. Lou Frissell Moore, shall retain the exclusive care, custody and control of the two minor children of the parties at all times and places except when the defendant and respondent, Bowman Stirling Tighe, is exercising the custody and visitation rights established by this decree.

It Is Further Ordered, Adjudged and Decreed that all costs incurred by virtue of the filing of the petition to modify agreed decree filed on July 2, 1962, and of entering this decree, and all costs incurred between July 2, 1962, and the date of the entering of this decree, be, and the costs are hereby taxed to the complainant and petitioner, Mrs. Lou Frissell Moore, but in the event of an appeal, no additional court costs are taxed to the complainant and petitioner, Mrs. Lou Frissell Moore, except as may be taxed by the Supreme Court of the State of Mississippi.

It Is Further Ordered, Adjudged and Decreed that the final decree entered by this Court on the 7th day of August, 1959, and recorded in Minute Book 185 at Page 173 of the Minutes of this Court be, and the same is hereby modified to the extent only that the child support payment to be paid by the defendant and respondent, Bowman Stirling Tighe, to the complainant and petitioner, Mrs. Lou Frissell Moore, due on the 7th day of July, 1963, and the 7th day of July of each and every year thereafter, is hereby eliminated, and the $125.00 child support payment to be paid by the defendant and respondent, Bowman Stirling Tighe, to the complainant and petitioner, Mrs. Lou Frissell Moore, due on the 7th day of August, 1963, and on the 7th day of August of each and every year thereafter be, and the same is hereby modified and changed from $125.00 to $62.50; otherwise, the final de-

cree of the 7th day of August, 1959, as amended and changed by further and additional orders of this Court, shall remain in full force and effect.

It Is Further Ordered, Adjudged and Decreed that the separate plea of res adjudicata is hereby overruled, and the cross-petition of respondent is hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the defendant and respondent, Bowman Stirling Tighe, having announced that he is aggrieved at the decision of this Court, is hereby granted an appeal to the Supreme Court of the State of Mississippi, but without supersedeas, this Court having determined upon the evidence adduced that it would not be to the best interest of the minor children of the parties that the decree of December 28, 1960, be continued any longer than is absolutely necessary, this Court having found that the same is impracticable, unworkable and contrary to the best interest of the children, and to grant an appeal with supersedeas with its attendant continuation of the decree of December 28, 1960, would be harmful and injurious to the minor children.

Ordered, Adjudged and Decreed this 7th day of August, 1962.

s/ S. V. ROBERTSON, JR.
Chancellor

STATE OF MISSISSIPPI
HINDS COUNTY FIRST DISTRICT

I, FRANK T. SCOTT, Clerk of the Chancery Court in and for the above mentioned County and State do hereby certify that the foregoing Decree of Modification No. 55,727 is a true and correct copy as appears on record in my office in Jackson, Mississippi.

Given under my hand and offical seal of office this the
day of August, 1962.

FRANK T. SCOTT, Chancery Clerk
By: s Judith Thompson, D. C.

EXHIBIT 12

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 42,559

BOWMAN STIRLING TIGHE — Appellant

vs.

LOU FRISSELL MOORE — Appellee

ASSIGNMENT OF ERRORS

Comes now the appellant, Bowman Stirling Tighe, and assigns the following as errors committed by the Chancery Court of the First Judicial District of Hinds County, Mississippi upon the hearing and trial of this cause in said lower court, to-wit:

1. The lower court erred in pre-judging this case against appellant and further in announcing both in the opening statement of the court (R. 64-65) and at another point in the course of the hearing prior to the hearing of any of the evidence of appellant (R. 116) that it had prejudged the case, and in denying to appellant a fair and impartial hearing (R. 64-66, 116-119), all of which being a denial to appellant of due process of law and equal protection of the laws in contravention of Section 14 of *The Constitution of the State of Mississippi* and of Section 1 of the Fourteenth Amendment to the *Constitution of the United States*, and further being a denial to appellant of right and justice and due course of law in contravention of Section 24 of *The Constitution of The State of Mississippi;* further that said court erred in allowing bias and prejudice to influence its said actions

and its decision in this case, resulting in the aforesaid denial to appellant of a fair and impartial hearing, and the consequent and further invalidity, as a matter of law and equity, of the decision and decree of the lower court.

2. The lower court erred in taking judicial notice both in its opening statement (R. 64-65) and again during the course of the hearing (R. 116) prior to the hearing of any of the evidence of appellant that the Agreed Decree of December 28, 1960 (R. 29-34) which provided for the custody and visitation of the two minor children of appellant and appellee as between said parties was not in the best interest of said children, and therefore pre-judging the evidence in the case and pre-judging the case itself against appellant.

3. The lower court erred in overruling the "Special Plea of Res Judicata" of appellant contained in the "Answer of Respondent To Petition To Modify Agreed Decree and Cross-Petition" (R. 55, 297-298, 314); and in considering proceedings in the cause and matters in such proceedings prior to December 28, 1960, the date of the said Agreed Decree (R. 116-119, 289, 293) in making its decision; the considering of said proceedings and matters therein constituting a further denial of the aforesaid constitutional rights of appellant and being in contravention of the hereinbefore cited provisions of the *State and Federal Constitutions.*

4. The lower court erred in finding that there had been a material change in the circumstances of the parties (R. 296, 300-301, 310) warranting a change in the custody and visitation of the two minor children of the parties and in finding that the best interest and welfare of said children demanded such change (R. 300, 310, 311) and

accordingly in rendering its "Decree Modifying Former Decrees" (R. 309-315) modifying the said Agreed Decree as to such custody and visitation.

5. The lower court erred in completely cancelling the custody and visitation provisions of said Agreed Decree thus effecting a sweeping change or modification of said Agreed Decree in the matter of the custody and visitation of the two minor children of the parties (R. 294, 310-311) while the petition of appellee filed in said cause below and its prayer sought only to modify the visitation of appellant (R. 42) and to "rearrange the time that (the children) spent with him". (R. 111)

6. The lower court erred in modifying or changing said Agreed Decree by relieving appellee of the requirement therein of obtaining permission of said court prior to any removal of said minor children beyond the jurisdiction of said court (R. 311), said matter not being raised by the pleadings or by the evidence in said cause and not being properly in issue before the lower court upon the hearing in said lower court; that such action by said lower court was further in violation of the aforesaid constitutional rights of appellant and in contravention of the hereinbefore cited provisions of the *State and Federal Constitutions*.

7. The lower court erred in entering its "Decree Modifying Former Decrees" (R. 309-315), in dismissing the Cross-Petition of Appellant (R. 314), and in failing to enter a decree granting to appellant additional visitation with the minor children of the parties as provided in said Agreed Decree (R. 29-30) and as prayed for in said Cross-Petition. (R. 56-58)

8. The lower court erred in overruling the aforesaid "Special Plea of Res Judicata" of appellant (R. 55,

297, 298, 314) also in so far as said plea concerned the relief sought by appellee in her petition and its prayer of cancellation of the "Performance Bond" (R. 14-16, 40-42) required of her by the order of the lower court dated April 28, 1960, (R. 11-13) and for discharge of the sureties thereon; and in consequently modifying said order, cancelling said bond and discharging the sureties thereon (R. 310); and on the other hand in failing to sustain said plea and to hold as a matter of law that the matter of modification of said order and cancellation of such bond, as raised in issue in said lower court by appellee in her petition (R. 40-42) was foreclosed by the said Agreed Decree of December 28, 1960; and further erred in considering proceedings in the cause and matters therein occurring prior to December 28, 1960, in making its decision to cancel said bond (R. 130-133, 296-297, 310); the considering of said proceedings and matters therein prior to such date constituting a further denial of the aforesaid constitutional rights of appellant and being in contravention of the hereinbefore cited provisions of the *State and Federal Constitutions*.

9. The lower court erred in refusing to require evidence of appellee to sustain the prayer of her petition for cancellation of the aforesaid "Performance Bond", in refusing to allow appellant to offer evidence in opposition to the same, in refusing to receive evidence concerning the same, (R. 130-133) and in pre-judging a decision to cancel said bond, all constituting a further denial of the aforesaid constitutional rights of appellant and being in contravention of the hereinbefore cited provisions of the *State and Federal Constitutions*.

10. That the findings and conclusions of said lower

cross" and decision in this cause are contrary to the law and the evidence, and are manifestly wrong.

Respectfully submitted,

BOWMAN STIRLING TIGHE, APPELLANT

BY: s Roger C. Landrum

His Attorney

CERTIFICATE OF SERVICE

I, Bowman Stirling Tighe, appellant pro se, do hereby certify that I have this day personally delivered to Honorable W. S. Moore, attorney of record for appellee: Lon Frissell Moore, a true and correct copy of the above and foregoing Assignment of Errors.

This the 21 day of December, 1962.

s BOWMAN STIRLING TIGHE

EXHIBIT 13

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,559

BOWMAN STIRLING TIGHE

vs.

LOU FRISSELL (TIGHE) MOORE

KYLE, Justice:

This case is before us on appeal by Bowman Stirling Tighe, the father of two minor children, Lynn Adelaide Tighe and Bowman Stirling Tighe, Jr., from a decree of the Chancery Court of the First Court District of Hinds County, rendered in favor of Mrs. Lou Frissell (Tighe) Moore, the mother of said minors, who had been awarded the custody of the minors, modifying a decree entered on December 28, 1960, granting temporary alternating custody and visitation rights to the appellant.

The record shows that the appellee was granted a decree of divorce from the appellant by the Chancery Court of the First Judicial District of Hinds County on August 7, 1959, in Cause No. 55,727, as shown on the Docket of said court. In the decree the court awarded to the appellee the custody of the two minor children, Bowman Stirling Tighe, Jr., and Lynn Adelaide Tighe; and reasonable rights of visitation were awarded to the appellant. The decree provided that the appellant should pay to the appellee the sum of $125 per month as alimony and the additional sum of $125 per month for the support and maintenance of the two minor children. The appellee was ordered to keep the two minor children within the jurisdiction of the court, and was prohibited

from removing the children beyond the jurisdiction of the court without permission granted by the court. An appeal was taken from that decree to this Court, and on October 24, 1960, this Court affirmed the decree of the lower court. Tighe v. Tighe, 239 Miss. 666, 123 So. 2d 623.

While the cause was pending on appeal to this Court a decree was entered by the chancellor on April 28, 1960, granting the appellee permission to take the children out of the jurisdiction of the court, and providing for visitation by the appellant while the children were in Little Rock, Arkansas. In that decree the appellee was required to execute a bond in the sum of $1000 conditioned that she would faithfully perform all obligations set forth in the decree and would thereafter submit herself and the children to the jurisdiction of the court. The performance bond was filed and approved on May 23, 1960; and for a period of several months thereafter the appellee and the two children resided with the appellee's parents in Little Rock, Arkansas. On October 24, 1960, an order was entered granting the appellant additional visitation rights while the children were in Little Rock, Arkansas, during the Thanksgiving vacation period.

On December 21, 1960, the appellant and the appellee approved an agreed decree setting out certain visitation rights on behalf of the appellant, which was approved and signed by the chancellor on December 28, 1960. Six days before the signing of the last mentioned decree, the appellee, Mrs. Lou Frisell Tighe, married W. S. Moore, a practicing attorney in Jackson, where she and Mr. Moore now reside. The visitation rights of the appellant provided for in the agreed decree cover approximately three pages. The basic provisions of the decree were as follows: (1) Regular week-end visits, to include

every week end in the calendar year, except as thereinafter stated, from 4:00 P.M. on Friday until 7:30 P.M. on Saturday, and from 2:00 P.M. on Sunday to 7:30 P.M. on Sunday; (2) Special week end and holiday visits, to include week ends and holidays thereinafter stated, from 4:00 P.M. on the last day of school for children preceding the holiday until 7:30 P.M. on the day preceding the first day of school for children after the holiday; spring holidays or Easter; July 4th holidays; Labor Day holidays; Thanksgiving holidays; Christmas vacations and holidays; and additional special days, including Father's Day, Mother's Day, etc. The decree provided further that the provisions of the decree for divorce relating to the requirement that appellee obtain permission of the court prior to taking the minor children beyond the jurisdiction of the court, should be modified to the extent that such permission should not be thereafter required for out of state visits not exceeding fourteen days. Other provisions of the decree are not involved in the issue presented for our decision on this appeal.

In all of the above mentioned proceedings the petitions and decrees of the lower court were docketed in Cause No. 55,727, which was the docket number given to the original proceeding for divorce which was granted on August 7, 1959, and all of the above mentioned decrees were signed by S. V. Robertson, Jr., Chancellor.

On July 2, 1962, the appellee, Mrs. Lou Frissell (Tighe) Moore, the mother of the two children, filed her petition in the chancery court, in Cause No. 55,727, asking that the court modify the decree of December 28, 1960, relating to the visitation rights of the appellant. In her petition the petitioner alleged that there had been a material change in circumstances of the parties

since the rendition of the agreed decree of December 28, 1960; that soon after the decree was entered she realized that the visitation arrangement established by the terms of the decree was harmful and injurious to the children, and that after waiting eighteen months she realized that the visitation arrangement set forth in the agreed decree was impracticable and unworkable. The petitioner alleged that the children during the last eighteen months had made many and lasting friends in their neighborhood; that the children had arrived at the age when they could visit in the homes of their little friends during the week ends and have their little friends visit in their homes; and it was not to the best interest of the children that they should be required to leave their homes and friends practically every week end during the school year.

The petitioner further alleged that, because of the unreasonable and impracticable visitation schedule set out in the decree, the children did not have a sense of permanency in their home and had not been able to enjoy their association with their mother during the week ends, thus depriving them of the pleasure and enjoyment of having a mother to do with them and for them the little things that they would treasure for the rest of their lives; and that because of the confusion created by the visitation provided for in the decree, the children had become uncertain and emotionally unstable. The petitioner further alleged that the material changes in circumstances mentioned above were due in part to the fact that the children were older, and that it was for the best interest of the children that the former decree be modified. Petitioner also alleged that the performance bond required of her under the decree of April 28, 1960, should no longer be required of her,

for the reason that she was now living with her husband in the City of Jackson and within the jurisdiction of the court, and there was no longer any necessity for such bond. Petitioner therefore prayed that process be issued for the defendant, commanding him to appear and show cause why the decree of December 28, 1960, should not be modified so far as visitation was concerned, and why the decree of April 28, 1960, should not be modified so as to eliminate the necessity for a performance bond.

The respondent filed his answer to the above mentioned petition on July 27, 1962; and in his answer the respondent denied that there had been a material change in the circumstances of the parties since the rendition of the decree of December 28, 1960. The respondent averred that the decree had been agreed to and signed by the petitioner and her attorney after every provision therein had been submitted to and discussed with her. The respondent denied that the custody and visitation established in the agreed decree was harmful or injurious to the children in any manner. He denied that the custody and visitation provisions of the agreed decree were unreasonable, impracticable or unworkable. The respondent also denied that the performance bond executed by the petitioner pursuant to the decree of April 28, 1960, should be cancelled. The respondent incorporated in his answer a "special plea of res judicata."

The cause was heard on July 27, 1962. The petitioner and the respondent both testified during the hearing, and several other witnesses were called to testify on behalf of the respective parties. It is not necessary that we undertake to summarize the testimony in this opinion. At the conclusion of the evidence the chancellor dictated

into the record his findings of fact and his conclusions of law. The chancellor found that there had been a material change in the circumstances of the parties since the order of April 28, 1960, was entered granting permission to the petitioner to take the children out of the jurisdiction of the court, and that a material change of circumstances had taken place since the entry of the agreed decree dated December 28, 1960, and that the best interest of the children and the parties would be served, if the decree of December 28, 1960, were modified.

The chancellor therefore ordered that the decree dated April 28, 1960, be modified to the extent that the petitioner be relieved of the requirement to post a bond to insure her faithful performance of the orders of the court, and that the bond executed by the petitioner on May 5, 1960, be cancelled and that the sureties be relieved from further liability thereunder, except any liability which may have accrued during the time the bond was in effect.

The chancellor further ordered that the agreed decree entered on December 28, 1960, be modified and changed to the extent that the provisions of the decree giving the respondent custody and visitation rights with the children on regular week ends, including every week end in the calendar year except as therein stated, and on special week ends and holidays be deleted; and that in lieu thereof respondent be awarded the temporary custody and visitation rights with the two children, outside of the home of the petitioner, on the first week end of each and every month, such week ends to begin at the hour of 4:00 P.M. on the first Friday of each month, and to end at 7:00 P.M. on the following Sunday night, and that the respondent have the temporary custody

and visitation rights with the two children, outside of the home of the petitioner, on the third Saturday afternoon of each month, and that the respondent have the exclusive care, custody and control of the two children from the first day of July of each and every year until the fifteenth day of August, pending further orders of the court, and during the Christmas holidays from December 26 until December 31. The respondent's special plea of res judicata was overruled. It was further ordered that the mother of the two children retain the exclusive care, custody and control of the two children at all times except as otherwise provided for in the new decree.

From that decree the respondent Bowman Stirling Tighe has prosecuted this appeal with supersedeas.

The appellant has assigned and argued four main points as grounds for reversal of the decree, viz." (1) That the lower court erred in prejudging the case against the appellant by announcing at the beginning of the hearing on the petition for modification of the decree dated December 28, 1960, and again during the course of the hearing, that it had prejudged the case, and in denying the appellant a fair and impartial trial; (2) that the court erred in overruling the appellant's "special plea of res judicata," contained in the appellant's answer to the petition to modify the agreed decree; (3) that the court erred in its finding that there had been a material change in the circumstances of the parties, which warranted a change in the custody and visitation rights of the appellant, and in its finding that the best interest and welfare of the children demanded that the provisions of the agreed decree be modified; (4) that the court erred in modifying the provisions of the decree of August 7, 1959, which required the appellee to obtain

permission of the court prior to any removal of the minor children beyond the jurisdiction of the court, and in relieving the appellee and her sureties from further liability on the performance bond executed by the appellee pursuant to the order of the court dated April 28, 1960.

We think there is no merit in the appellant's contention that he was denied a fair and impartial hearing on the petition for modification of the agreed decree of December 28, 1960. It is true that the court, at the beginning of the hearing, expressed disapproval of the schedule of visitation set forth in the agreed decree, which the court described as "the most complicated and the most intricate system of visitation that I have ever seen," and "not for the best interest of these children," and that the court also said: "I don't intend to hear much testimony on this in defense of this agreed decree by virtue of the fact that it was agreed to." But, notwithstanding the remarks made by the court, it appears from the record that we have before us that the court granted a full hearing to the parties on the issues presented by the pleadings. The hearing consumed several hours, and the testimony of the appellant and the appellant's witnesses cover more than one hundred pages of the 235-page transcript of testimony that we have before us. The chancellor was not disqualified from hearing the case. No request was made by the appellant's attorney that the chancellor recuse himself, or that the case be transferred to another division and be heard by another chancellor. The record does not reflect any personal bias of the trial court toward the appellant.

A careful reading of the record shows that the trial judge was fair and impartial in the rulings made by him on the evidence. The only ruling on the evidence

to which exception has been taken in the appellant's brief filed on this appeal relates to the ruling of the court on the appellant's offer of proof to establish a need for a continuation of the obligation of the performance bond, which the court had required the appellee to execute when she carried the children with her to Little Rock, Arkansas, for an extended stay with her parents prior to her second marriage; and on that issue the appellant's attorney was permitted to state into the record the appellant's position that there was still a need for the bond as evidenced by the fact that the appellee had removed herself and her children from the State of Mississippi to the State of Arkansas "three times within the last year and a half." We think that the ruling of the trial judge on that point was not prejudicial to the rights of the appellant.

The appellant has cited numerous cases in support of his contention that he was denied a fair and impartial trial. But the cases cited by the appellant involved instances where the appellants were deprived of their right to present evidence, and none of those cases are applicable to the facts in this case. There was no denial of the appellant's constitutional right to a fair and impartial trial.

We also think there is no merit in the appellant's contention that the court erred in overruling the appellant's special plea of res judicata, or that the court erred in its finding that there had been such change in the circumstances of the parties as warranted a change in the temporary custody and visitation rights of the appellant, or that the court erred in its finding that the best interest and welfare of the children demanded that the provisions of the decree of December 28, 1960, be modified.

Section 2743, Code of 1942, Rec., provides as follows: "When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, * * * and the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require * * *."

In Bunkley and Morse's Annis on Divorce and Separation in Mississippi, p. 316, Sec. 1608, it is said: "The custody and support of children may be decreed by the court in any divorce or separate maintenance proceeding or on a writ of habeas corpus. In every such case the decree is conclusive of the facts then existing. The court will always hear and inquire into any substantial change of circumstances and make such new decree as the facts may seem to warrant."

"The mere fact that the children were older at the time the decree appealed from was entered would not in itself constitute such change in circumstances and surroundings as to justify a change in the general or permanent custody of the children from one party to the other. But the issue which the chancellor was called upon to decide did not involve the permanent custody of the children, but only a change in dates and periods of time during which the appellant was to have the temporary care and custody of the children for the purpose of visitation. The question which the chancellor was called upon to decide was whether or not the circumstances and surroundings of the children at the time of the hearing on the petition to modify the agreed decree were

such as to require a change in the schedule of visitation established by that decree.

The evidence shows that at the time of the rendition of the agreed decree Lynn Adelaide was seven years of age and that Bowman Stirling was 5½ years of age. During much of the time since the separation of their parents in April 1959 the children had been deprived of the benefits of a fixed place of residence and a stable family life. For a period of ten months next preceding the date of the agreed decree the children had lived with their mother in the home of their mother's parents in Little Rock, Arkansas. After their mother's second marriage they returned to Jackson and moved into a new home. Both of the children had reached school age and during the next succeeding eighteen months the children made new friends among the school children of their own ages and other children in the neighborhood; and at the time of the hearing of the petition for modification of the agreed decree the children had been accustomed to a stable family life and a friendly association with other children at home and on the play grounds. The testimony was conflicting on the issue as to whether the children were upset by the enforced observance of the terms of the agreed decree, and whether the visitation arrangement provided for was detrimental to the best interests of the children. The appellee testified that the children had cried frequently when they had to leave home to go with the appellant at the week end, and that on several occasions the children had requested the appellant to permit them to remain at home and their request was refused. The testimony of the appellee was corroborated in part by two other witnesses who observ-

ed instances when the children became upset at having to leave home.

From the testimony as a whole we think the chancellor had a right to conclude that the children had reached the age when it was not to their best interest and that their custody be shifted from one home to another during each week end through the school year; and that it was not to the best interest of the children that they be deprived of the privileges enjoyed by other children of spending part of their week ends at home with their mother and among their friends and playmates. We think it cannot be said that the chancellor erred in his finding that the schedule of visitation provided for in the agreed decree was impracticable and that the week end changes of custody were not for the best interest for the two children under the circumstances existing at the time of the hearing.

In Evans v. Evans, 195 Miss. 320, 15 So. 2d 698, the Court had under consideration a factual situation which resembled in many respects the factual situation in this case. In that case the parties had been divorced in November 1941 and a decree had been entered awarding to the father, to a very large extent, the custody of a 7-year old minor child. At the November 1942 term of the court, on application of the mother, the decree was modified to the extent that the father was only permitted to have the custody of the child on Sunday afternoons from 1:00 P.M. until 6:00 P.M. At the April term of the court, five months later, on application of the father, a decree was rendered giving to the father exclusive custody of the child for the month of July each year. The decree left the Sunday visits in force. On appeal by the mother this Court affirmed the chancellor's decree.

The changes in the custody decree in that case, as in the case that we have here, were of a minor nature, in that the changes did not affect in any material way the permanent custody which had been awarded to the mother. As stated by Judge Griffith in his specially concurring opinion in that case, "The modern rule is that it is only when there is a substantial modification of the custody decree that a substantial change of circumstances must first be shown. And time out of mind the chancellors of this state have so construed their powers under what is now Section 1421, Code 1930; they have modified custody decrees in matters of minor detail when experience under a former decree has shown the modification to be to the child's interest, and this although the general situation of the parties remained substantially the same, and in this they are within their authority."

The fact that the decree of December 28, 1950, was agreed to by the appellant and the appellee at the time the decree was entered did not preclude the court from subsequently modifying the decree when, at a later date, after a hearing, it appeared to the court to be detrimental to the welfare of the children. "The fact that a separation agreement, incorporated in a divorce decree, has disposed of the children's custody is immaterial, since this is a matter on which the parties cannot finally contract, the court having jurisdiction regardless of the agreement. While such a contract should be given serious consideration by the court, any agreement with respect to custody is not controlling, and does not preclude the court from subsequently modifying it." 27B C.J.S., 557, Divorce, Section 317(2)h.

In discussing the effect of a decree regarding custody of a minor child and the modification of such decree,

the textwriter in 39 Am. Jur., p. 614, Parent and Child, Sec. 25, says: "In view of the ever changing conditions of fortune and society, it is clear that if the courts are adequately to carry out their duty of protecting and fostering the welfare of children in making awards of their custody, it is necessary for them to reconsider such awards where the circumstances of the case change after the entry of the original decree, and, if the welfare of the child requires it, to modify the decree and make a change or altogether different disposition of the custody of the child. There would seem to be no question but that the courts have the power to do this. * * * Unless new facts are shown to exist, the previous decision of a competent court with respect to the custody of a child will ordinarily be regarded as res judicata, although not where the circumstances have changed since the entry of the original decree, or where, even though there has been no material change of circumstances, the welfare of the child requires a change of custody * * * *"

We think there was no error in the court's order relieving the appellee and the sureties on the performance bond executed by the appellee on May 5, 1960, pursuant to the decree signed by the chancellor on April 28, 1960, granting permission to the appellee to remove her residence together with that of her minor children to Little Rock, Arkansas. The record shows that the appellee had become a permanent resident of the City of Jackson at the time of the hearing and there was no further need for such performance bond.

We find no reversible error in the record, and the decree of the lower court is therefore affirmed.

AFFIRMED.

McGEHEE, C. J., AND GILLESPIE, McELROY AND JONES, JJ., CONCUR.

Monday, April 22, 1963, Court Sitting:

Bowman Stirling Tighe

No. 42,599 vs.

Lou Frissell Tighe Moore

This cause having been submitted at a former Term of this Court on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 7th day of August, 1962 be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the appellee do have and recover of and from the appellant and Bernard L. Tighe and Mrs. Hallie Stirling Tighe, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper proper process issue.

Minute Book "BM" Page 620

EXHIBIT 14

Monday, June 3, 1963, Court Sitting: : : : : : : : :

Bowman Stirling Tighe

No. 42,559 vs.

Mrs. Lou Frissell (Tighe) Moore

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Minute Book "BX" Page 16